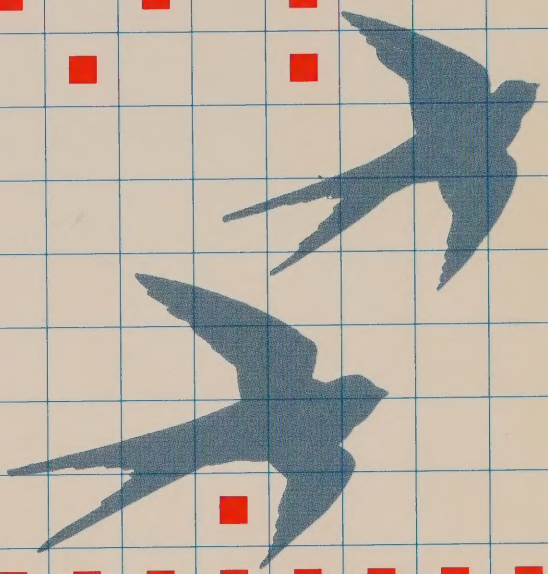
Fairness and flexibility in retiring from work

Ontario

Report of the Ontario Task Force on Mandatory Retirement

56 57 58 59 **60** 61 62 63 64 **65** 66 67 68 69 **70** 71 72 73 74 **75**



Report Of The Ontario Task Force On Mandatory Retirement

Fairness And Flexibility In Retiring From Work

December 1987

30 November 1987

The Honourable Gregory Sorbara
Minister of Labour
Government of Ontario

Dear Mr Sorbara

We are pleased to submit the report of the Task Force on Mandatory Retirement which was established by Order in Council of May 1986.

All of which is respectfully submitted,

Ron W. Ianni
Chairman

Dan Damov

Heather Webster

Contents

Introduction

The Issue Of Mandatory Retirement

About 2.5 million working people in Ontario — half the labour force — are in jobs subject to mandatory retirement, usually at age 65. Through various means, such as collective agreements, company or institutional policies, and pension fund conditions, these employees are required to resign from their positions on attaining a given age. If they are kept on staff after that age, they can be dismissed at any time (unless they have a special contract) simply because they are past the normal retirement age.

Views Against

The appropriateness of mandatory or compulsory retirement is being widely questioned. Some see it as a form of age discrimination that offends the rights of the individual. In particular, it may violate provisions of the Canadian Charter of Rights and Freedoms, which came into force in April 1985. Others regard mandatory retirement as in many cases needlessly and unwisely depriving the Ontario economy of its most experienced and effective participants.

Governments are showing a tendency to prohibit compulsory retirement. For example, such policies have been banned by the United States federal government and by three Canadian provinces: New Brunswick, Quebec, and Manitoba. The federal government in Canada as well has announced its intention to ban mandatory retirement in areas under its jurisdiction (such as the federal public service, banking, and interprovincial transportation).

Views In Favour

At the same time, a prohibition on mandatory retirement is not a move to be lightly considered in Ontario. The notion of having to retire by a certain age has for decades been an accepted part of individual career planning and organizational human resource decisions in millions of jobs. The ramifications in areas such as pension design and funding, potentially extensive, have not been clear. The issue is one in which the rights of older employees may conflict with the rights of younger ones, for whom mandatory retirement has opened new jobs and promotion opportunities. Furthermore, a decision to ban would depend also on consideration of

related issues such as legislative options, transition period measures, settlement mechanisms for dismissal disputes, employee evaluation systems, and part-time work regulations.

Mandate Of The Task Force

To look into the pros and cons of mandatory retirement and the network of issues associated with it, the Ontario Government established the Ontario Task Force on Mandatory Retirement, announced by the Minister of Labour, the Honourable William Wrye, in May 1986. The Task Force was composed of Ron Ianni, Chairman, President of the University of Windsor; Daniel Damov, President and Chief Executive Officer, Travelers Canada; and Heather Webster, Research Director, Amalgamated Clothing and Textile Workers Union. David Conklin was appointed Research Director and Executive Secretary of the Task Force.

The Terms of Reference given to the Task Force were as follows:

> The Ontario Task Force on Mandatory Retirement has been established to study and make recommendations with respect to issues related to mandatory retirement, taking into account:
>
> 1. the conflicting interests of older and younger workers;
> 2. the appropriateness of automatic non-discretionary practices flowing from pension plans and from collective agreements;
> 3. the ramifications of the abolition of mandatory retirement for personnel and human resources planning practices; and
> 4. the funding and design consequences for pension plans should mandatory retirement be prohibited.

A study project was undertaken to investigate these issues and a number of others identified by the Task Force members themselves. The present report is the result.

The Study Project

To carry out the mandate, the Task Force designed and undertook a phased work plan of information-gathering, research and analysis:

Overview

A background paper was developed, entitled "An Overview of the Issues" (Appendix E of this report), which surveyed the field of retirement policy

from the standpoints of history, rationale, current practices, and implications of any proposed changes.

Public consultation

Through newspaper advertisements the Task Force called for written submissions from the public and from special interest groups, offering copies of the background paper and other information to anyone on request. Later the Task Force met with representatives of various interest groups in the province to receive their views and observations. Finally public hearings were advertised and held in Toronto, Ottawa, Windsor, and Sudbury to gain the views, comments, and recommendations of interested members of the public.

Research

The Task Force identified a number of highly qualified researchers who had published widely on issues relevant to mandatory retirement, such as the funding and design of pension plans and employee benefit plans, wrongful dismissal, collective agreements, human rights, and judicial interpretations in the field. These experts were commissioned to undertake research for the Task Force on key topics. The resulting research papers were consulted in the development of conclusions and recommendations; they have been bound separately and are available to interested parties on request.

Analysis

The Task Force distilled and debated the information gathered from public consultation and from the research reports, discussing the issues in a number of joint and individual meetings with the principal researchers.

Reporting

Finally the present report was drafted, setting out and explaining the Task Force's conclusions and recommendations.

Structure Of The Report

The report presents conclusions and recommendations in three parts, which are followed by several appendices. Appendix E summarizes the research and public consultation findings on which those conclusions and recommendations are based.

Part One: Should Ontario Ban Mandatory Retirement?

This first part of the report reviews the evidence and arguments on this central question. Among the issues examined in depth are the current trends

in judicial interpretation since the proclamation of the Canadian Charter of Rights and Freedoms, the interests and rights of individuals and groups, the numbers and categories of employees likely to be affected, the possible effects on employer/employee relationships, the consequences for pension plans and personnel planning, problems of employee evaluation and dismissal, and the experience of other jurisdictions where mandatory retirement has been prohibited. A wide range of issues and interpretations has influenced the views of the Task Force.

The members of the Task Force were in general agreement that there should be much more flexibility available to Ontario employees approaching a retirement decision. The Task Force found that, although strong opinions are often held in Ontario on each side of the issue of mandatory retirement, a decision to ban or retain it would actually affect relatively few employees.

Part Two: How Would A Ban Be Implemented?

The second part of the report examines how a prohibition of mandatory retirement, if enacted, should be put into effect. On this question the issues investigated include possible exemptions from the ban, whether there should be a transition period, the banning mechanism, the consequences for the design and funding of pension plans, and the settlement of disputes over dismissal. Points where government intervention would be desirable have been identified.

In these areas the Task Force has made recommendations to guide the Ontario Government if it should decide to proceed with a ban.

Part Three: Apart From A Ban, What Can Be Done?

During its inquiry the Task Force noted a number of steps the government could take, whether or not mandatory retirement is prohibited, to make the process of retiring from work fairer and more flexible for Ontario employees. These measures are grouped in the areas of retirement support and counselling and the encouragement of part-time work and work sharing.

The Task Force advances these recommendations for action regardless of the decision on a ban.

Appendices

The report is followed by five appendices. The first four are relatively brief. Appendix A presents the comments of Task Force members on the advisability of abolishing mandatory retirement practices. Appendix B lists in

order all the recommendations in the report. Appendix C lists the names of the organizations and individuals making submissions to the Task Force and participating in the hearings. Appendix D, "An Overview of the Issues", is the background paper produced by the Task Force at the beginning of the project and used for public consultation.

Appendix E is very large and may be separately bound. It presents in some detail the most significant findings from the research and public consultation conducted by the Task Force. Here the interested reader will find more detailed information about the issues on which conclusions have been reached and recommendations made.

Much of this appendix consists of selected excerpts from the research reports commissioned by the Task Force. These selections represent the Task Force's own interpretations of significant evidence. They do not necessarily reflect the views or complete words of the authors of those reports and are not intended to stand as authoritative in themselves. For example, they omit the scholarly apparatus of footnotes and references given in the reports. Any reader wishing to pursue an issue critically beyond the views of the Task Force should therefore go directly to the research reports, which will be available from the Ministry of Labour.

Part One

Should Ontario Ban Mandatory Retirement?

Introduction

Mandatory retirement affects many aspects of life. Among the areas potentially affected by banning or retaining mandatory retirement are career planning and job security, promotion and job creation, human resource planning and industrial relations, pensions and old age security, the capabilities and productivity of seniors, the rights of individuals and groups, and the collective bargaining process.

A change in retirement practices such as the abolition of mandatory retirement would cause adjustments to be transmitted throughout these interlocking systems of rights and obligations. The question is whether the new equilibrium that would be reached by these particular adjustments would be preferable to the present situation.

To explain and weigh the consequences of banning mandatory retirement in Ontario, they are systematically reviewed below as effects on:

- Society
- Employees
- Employers.

The experiences of other jurisdictions with the prohibition of mandatory retirement are also examined. Finally the views of the Task Force on the advisability of a ban are presented.

Effects On Society

Introduction

A leading concern associated with compulsory retirement is that of individual rights. Some observers believe that mandatory retirement constitutes age

discrimination, violating the Canadian Charter of Rights and Freedoms, and call on the Ontario Government to ban it by statute. A related but opposing concern is the right of contract, especially the right of collective bargaining agreements, to impose non-discretionary requirements such as age-based retirement provisions. A third social concern is the possible increase in costly grievances and litigation if the end of mandatory retirement leads to extensive conflicts over the legitimacy of discretionary terminations. Finally, a measure of the social significance of the issue is the likely number of people affected by a ban.

Individual Rights

Concerns have been raised in recent years that mandatory retirement is unfairly discriminatory. Some individuals feel able to work beyond the arbitrary age set for them and believe it should be their right to do so.

The problem

To some people the age level is the objection. The average age of entry to the work force is rising because of greater educational requirements, while life expectancy is increasing. Age 65 may no longer be appropriate for compulsory retirement; 70 or some other age might be more appropriate today.

For others, however, the concept of forced retirement itself is the problem. Individual circumstances of education, health, abilities, opportunities, and inclinations vary so widely, they say, that there should be complete flexibility about the age of retirement.

In particular, mandatory retirement causes severe financial hardship to people who have not been able to accumulate enough pension credits to ensure a reasonable replacement income, such as women who have left the work force to raise children, immigrants who arrived in Canada late in their working lives, and people who have suffered from marriage breakdowns. Retention of the particular job in which one has developed experience and seniority is especially important for these individuals.

Legal status

The Ontario Human Rights Code in Section 4(1) prohibits discrimination in employment on the basis of age. But in Section 9(a) it defines age as being between the ages of 18 and 65. So the Code either permits age discrimination after 65 or does not address the problem. In the former case the Code may violate the Canadian Charter of Rights and Freedoms. In fact, several lawsuits against compulsory retirement currently before the courts cite the Charter.

Many people believe the Ontario Government should make up its own mind and take the intiative either to ban mandatory retirement or to support it. They point out that more is involved than individual rights, and the choice is really one for the political system to make rather than for the courts. Even if the Supreme Court ruled that mandatory retirement were incompatible with the Charter, the Ontario Government could still retain it by invoking the "notwithstanding" clause of the Constitution and override the Charter by passing an appropriate statute every five years.

Age discrimination hard to prove

Age discrimination in labour markets has not been demonstrated with empirical data as have race discrimination and sex discrimination. For race and sex, economists have been able to isolate earnings discrepancies that are not attributable to legitimate wage determinants such as education, training, and experience. Similar comparisons between younger and older employees cannot be made because too many factors change during employees' lifetimes to allow the isolation of particular discrepancies attributable only to age. The problem is compounded by the normal practice of dissociating earnings from productivity in favour of seniority, a practice economists call a "deferred compensation system" (discussed later). Age discrimination, if it exists, is hidden statistically.

It is also hidden partly by its democratic nature. Unlike other forms of discrimination, sooner or later everyone who lives joins the group of victims.

The Right Of Contract

It can be argued that mandatory retirement is not age discrimination but the condition of termination of a contractual arrangement. As such it is one condition among many constituting an employment package agreed upon by an employer and employees. A similar condition, and one often twinned with mandatory retirement, is a pension plan. Both are usually leading features of collective agreements negotiated and supported by management and unions.

Interference in a contract

The Task Force has found that neither management nor labour regards negotiated mandatory retirement as age discrimination or an infringement of rights. Employees are not deprived of rights when they voluntarily choose not to exercise them for a period of time.

In fact labour and management tend towards the contrary view that banning mandatory retirement would interfere with their ability to make tradeoffs between the competing objectives of employees and the equally

compelling needs of employers. Far from being an arbitrary rule imposed on an unwilling and uninformed work force, mandatory retirement in a collective agreement is part of a mutual definition of a work and compensation environment.

In this view the concept of discrimination does not apply to wage contracts, because the mandatory retirement agreed to does not affect those who have not been party to the agreement, is subject to periodic review when the agreement is renegotiated, and is virtually always reinstated as mutually advantageous to all parties.

Society can limit contracts

Society of course places restrictions on the terms of private contracts. A collective agreement that paid women less than men for the same work would be illegal however willing the women in the case might be. Indentured service (paying a person's passage for a specified period of labour) is illegal whatever the views of the prospective parties. So are many other consenting transactions. These contractual agreements are illegal because they impose costs on third parties, or potentially exploit persons with little information or bargaining power, or discriminate against human or civil rights, or are simply socially unacceptable.

Society may deem that mandatory retirement should be prohibited even if freely negotiated in return for benefits such as job security or pensions. It might do so on the ground that employees are ill-informed about the consequences of mandatory retirement, or are myopic in preferring current employment oportunities to the possibility of continued employment, or discount the future too much. But such grounds are less likely to receive consensus support than age discrimination.

Costly Grievances And Litigation

Mandatory retirement is often said to make possible an involuntary disengagement from work with dignity, solving a problem for both employer and employee. Banning it would pose this problem again for employees who chose not to retire voluntarily. The result might well be a greater number of dismissals and of unfortunate and embarrassing dismissal circumstances, and more frequent charges of wrongful dismissal.

Banning mandatory retirement might lead to an increase in the number of dismissals among two groups of employees:

- employees younger than 65 whose productivity had declined to an uneconomic level in the opinion of the employer but who, in a mandatory retirement regime, would have been kept on staff because their retirement was approaching

- employees older than 65 whose productivity had become increasingly out of step with their earnings and who showed no intention of resigning.

At the present time, cases of wrongful dismissal are potentially grieved under collective agreements or litigated under common law. A prohibition of mandatory retirement, by clarifying and reaffirming the illegality of age discrimination among seniors, would widen the potential grounds for charges of wrongful dismissal by dismissed employees, thereby increasing the frequency of grievances and litigation. Would the province's industrial relations and legal systems become clogged with such cases if mandatory retirement were banned? Would new dispute settlement mechanisms become necessary?

Disputed terminations are stressful, lengthy, and costly, and do not contribute to industrial productivity. Society has an interest in minimizing their incidence.

The Task Force's research suggests that if mandatory retirement were abolished the legal system would probably not become unduly burdened with dismissal disputes, but that in any event the province would have the power under the Constitution Act to establish a dispute settlement tribunal for such cases if it wished to do so.

Number Of People Affected

As mentioned above, an estimated two and one-half million Ontario working people are in jobs subject to mandatory retirement. However, the number of people that may be affected by a ban on mandatory retirement is much smaller than that.

Direct effects are limited

Research findings indicate the following:

- It has been estimated that of 100 people aged 55 and in jobs subject to mandatory retirement, 71 will no longer be working at age 65 (15 having died, 6 having been laid off permanently, and 50 having resigned for health reasons or taken early retirement), 25 will retire at age 65, and 4 will continue to work.

- The average age of retirement has been falling and will continue to do so as projected improvements in pensionplans will make early retirement feasible for a wider number of employees.

- With all other considerations incorporated, it is estimated that 5,000 to 10,000 persons a year over the next decade would consider working beyond age 65 in Ontario if mandatory retirement were abolished.

- If these people work an average of five additional years, a maximum of 25,000 to 50,000 would be working past age 65 at any time in Ontario, an addition of no more than 1 per cent of the total provincial labour force — though as noted earlier the impact on the group age 65 and over would be much more significant.

Overall, the overwhelming majority of Ontario working people would not be directly affected by a ban of mandatory retirement.

Indirect effects are transitory

The indirect effects on job creation and promotion would be more widely distributed but still not large. A "loss" of 50,000 new jobs would have a significant effect if it were concentrated on a particular age group. But such a loss would more likely be distributed among all age groups. In general there is no direct correlation between the retirement of a senior employee and the hiring of a junior employee in replacement except in special cases such as university faculties. Moreover, the loss of new jobs might not occur; some economists argue that the labour force growth will create new consumer demand and hence new jobs. Finally, this growth in the labour force would occur gradually over a number of years.

The effects on promotion through the loss of openings when senior people delayed their retirement would also be an impact to be absorbed over several years.

In this light, the issue of whether to ban mandatory retirement may well have greater symbolic than practical reality for the people of Ontario.

Effects On Employees

Introduction

The banning of mandatory retirement would increase the proportion of voluntary retirements, already the majority, to include all those who are not dismissed. The growing tendency of people to weigh all the factors and make a voluntary retirement decision will become the overwhelming norm. The option of banning mandatory retirement draws attention to some of the hard choices often involved in this decision.

Mandatory retirement is sometimes justified on the ground that it saves senior employees from more stringent employee evaluation systems that would otherwise be adopted by employers to track the productivity of seniors whose competence was in decline. Others suggest that banning mandatory retirement would cause income levels to move closer to reflecting

productivity among all employees. Economists refer in that case to a decline of deferred wage compensation. The consequences of a ban in opening jobs for younger workers must also be considered.

The Retirement Decision

Most retirements in Ontario at present are voluntary, either because the jobs are not subject to mandatory retirement or because early retirement was chosen. With a prohibition of mandatory retirement, all retirements will become voluntary.

Income security

The Task Force inquired into the factors affecting voluntary retirement decisions. Of central importance is income security in old age, and voluntary retirement will tend to be postponed until that is established. Obviously the fraction of working people who did not retire by choice but will be allowed to do so if mandatory retirement is banned includes those lacking, and trying to establish, such income security. The ban would provide some relief for them, and they will be among those who continue working.

Psychological impact

Another important factor, felt by all who retire but perhaps most strongly by those who have resisted doing so, is fear of the psychological impact of an abrupt transition from full-time work to total retirement. Some fear the loss of stimulation, of a sense of satisfaction and achievement, of the discipline and structured time of the work place, of the camaraderie with fellow employees. Others fear "loss of face", social rejection, depression, an acute awareness of mortality. Such fears sharpen during the dislocation of retiring from work.

Flexibility

There is a near-unanimous belief among those approaching retirement and those recently retired that the disengagement from work should be made a more gradual process than it usually is. They would prefer a retirement phase in the working career, with reduced hours per day or days per week, greater use of study leave and furloughs, more opportunities for part-time assignments. Since personal circumstances differ so widely among those who retire, the goal would appear to be to achieve greater flexibility and individuality in arrangements.

The banning of mandatory retirement would be a step towards relieving individual cases of financial hardship and increasing retirement flexibility. It would not make the much broader changes in retirement arrangements many

seniors advocate, though it might help draw attention to the importance of those changes. Interviews conducted for the Task Force showed that some seniors viewed the concept of mandatory retirement as an indignity of age discrimination, and as denigrating the elderly by implying that age brings incompetence. Retirement, in their view, should be clearly distinguished from some arbitrary notion of an appropriate age.

Employee Evaluation Systems

Methods of monitoring and appraising employee performance are attracting growing interest in Canada and other industrial countries. Motivating this interest is an increasing concern for competitiveness, productivity, and efficiency. This broader trend has stimulated a similar concern associated with the banning of mandatory retirement.

Monitoring productivity

Mandatory retirement has been rationalized in part on the ground that it minimizes the need to monitor and appraise the performance of older employees. It is said that if an employee whose productivity declines happens to be nearing retirement, employers may be willing to "carry" the employee, knowing that their losses will be limited, and may grant normal wage increases rather than appear mean-spirited, especially if pension accruals depend on final years' earnings. The sympathies of other employees are also felt to be more easily elicited as retirement is approached.

If mandatory retirement were banned, in this view, there is less likelihood of these kinds of assistance being given to such an employee because there is no way of knowing how long the assistance may be required. Employers would also have an incentive to plan for the possibility of dismissing the employee. The result would be more monitoring and assessment of senior employees generally. The evaluation systems that evolve for this purpose might seem invasive and undignified for these employees.

Equivalent to age discrimination

On examination this argument does not seem to have much weight as a justification for mandatory retirement. It makes several assumptions for which the Task Force has found no evidence:

- that retirement and incompetence tend to be related
- that age and incompetence tend to be related
- that senior employees at present escape evaluation
- that employees tend to continue to work in jobs in which their performance is unsatisfactory

- that retiring everyone is preferable to dismissing a few.

Very likely none of these assumptions is correct. If they are false, the argument not only fails to support mandatory retirement but also begins to resemble a classic expression of age discrimination.

Deferred Wage Compensation

A ban on mandatory retirement has been thought likely to affect the way income is deferred over an employee's earning lifetime.

Wages and productivity

Economists suppose that the total lifetime income earned by an employee is equal to the total lifetime value produced by that employee. They see two main ways in which that income is held back from the employee at the time the value is produced and instead paid later. The obvious way is through a pension, the payments from which are held to be deferred wages averaged out on an actuarial basis.

The second way is less obvious and arises from the fact that the actual wages of an employee during the working career increase continuously up to retirement even though all kinds of measures of productivity have shown to general agreement that productivity does not rise as fast or, after an initial period, at all. Since total income and total produced value are considered equal, what has happened, according to the theory of deferred compensation, is that the employee has been underpaid in earlier years and overpaid in later years.

Wages therefore tend not to reflect current productivity, that is, the value being produced by the employee in any given time. Apart from the portion of compensation going into a pension fund, wages in early years will be lower and in later years will be higher than strict productivity measures would dictate.

A reason for mandatory retirement?

Mandatory retirement is believed by some to be an important part of this generally agreed on system. For example, an employee choosing to continue on after the normal retirement age would receive wages increasingly in excess of productivity and would soon have received more in lifetime income than was produced in lifetime value. Such an employee would be subsidized by other employees or by the employer. In this view a deferred wage compensation system depends on mandatory retirement to provide a termination date to prevent compensation from exceeding productivity for an indefinite period.

A separate matter

However, mandatory retirement may not really be crucial to the deferred wage system. As mentioned earlier, in practice only a small proportion of the work force is compelled to resign by it. Even if it were banned, probably fewer still in future would continue to work past age 65. The growing prevalence of early retirement shows that for most people even wages that exceed productivity do not equal the value attached to retirement. The deferred wage system has shown itself robustly independent of the small and diminishing role of mandatory retirement.

Opening Jobs For Younger Workers

Mandatory retirement has been supported on the ground that it opens up jobs for younger employees. When significant unemployment is unavoidable, in this view, it is preferable for jobs to be shared among all so that the problems of unemployment are not loaded on one group. Thus mandatory retirement should be promoted rather than banned.

The number of job openings involved has been discussed earlier. The point considered here is that to impose retirement at a fixed age is an arbitrary and unfair way to spread jobs among the population.

Separate matters in principle

The Task Force notes that the goal of spreading jobs among the population almost contradicts the notion of retirement at a fixed age. The objective is to limit the number of years of work by an individual, whatever the age of the individual. Retirement would occur at a range of ages depending on how quickly the allotment of work years was accumulated in the individual's work history.

To give everyone the same number of work years thus implies mandatory retirement that is not age-based. In contrast, the concept of mandatory retirement at a fixed age as it exists in Ontario imposes the sharing of job opportunities on only those employees who happen to be 65.

Ambiguous connection in practice

In general discussion, however, the relation between work sharing and mandatory retirement at a fixed age is often confused. On one hand the advocates of work sharing sometimes oppose the abolition of a fixed retirement age as a step backwards because it would allow those with jobs to continue to monopolize them indefinitely. On the other hand these advocates also recognize that greater work sharing in Ontario will entail the growth of a greater variety of more flexible working arrangements to suit individual

circumstances, and they acknowledge that the abolition of mandatory retirement would indeed be a step in this direction.

Effects On Employers

Introduction

The prohibition of mandatory retirement raises possible implications for pension plans, with are often associated with it. Will the banning of mandatory retirement place burdensome pension obligations on employers or require significant alterations in pension plan design? It is sometimes suggested that the ending of compulsory retirement would increase uncertainty in personnel planning by employers. Finally, prohibiting mandatory retirement may be part of a larger trend towards greater variety and flexibility in working arrangements with which employers are having to come to terms.

Pension Plans

A majority of pension plans in Ontario are coupled with a provision for compulsory retirement. Some people see this link as essential from the employer's point of view so that senior employees will not continue to accrue benefits indefinitely. Would allowing employees to work after age 65 force employers into costly redesign of pension plans?

A "normal retirement" age

Pension plans need not be based on required retirement at a fixed age. Instead they can be based on a stated "normal retirement age" after which the benefit rules may change for employees who have not retired. That is what has been done in many jurisdictions where mandatory retirement has been prohibited. There are a number of ways in which the benefit rules may be changed for employees working beyond normal retirement age, as will be seen later in this report, and they can have strongly differing effects.

Retirement incentives

In fact, pension plans can be used to influence employees to retire earlier or later. Innovative arrangements and incentives can promote early retirement or can stress the importance of final years' earnings. These features could have much more influence over retirement practices than banning or retaining mandatory retirement. Recognizing this, jurisdictions that have banned mandatory retirement have usually at the same time placed

restrictions on pension plans to prevent them from being so disadvantageous to the continuing employee as to have an equivalent effect.

Costly buy-outs

Some employers fear that the loss of a fixed retirement age and the difficulty of dismissal procedures could force them to offer large severance payments to get resignations. This might happen if an honest employee became incompetent. It might also happen if a dishonest employee deliberately stayed on, purposely underproducing, in the hope of extracting a "golden handshake". Mandatory retirement, in this view, offers the employer some protection against perverse incentives and higher severance costs.

Just as the Task Force does not foresee a marked increase in dismissal disputes in the absence of mandatory retirement, so it does not expect a significant increase in such buy-outs. The reason is simply that such practices are not prevented by the existing mandatory retirement regime. If employees in their early sixties do not cause these problems now, there is no reason to believe that employees in their late sixties would do so in future — especially since far fewer employees will be involved.

Uncertainty In Personnel Planning

Mandatory retirement as a personnel policy may exist in part to facilitate planning by providing a degree of certainty about staff requirements. It gives employers a fixed termination date around which they can plan for such things as renewals, training, and pension obligations. Without compulsory retirement there would be increased uncertainty about whether senior employees will remain on staff and for how long. These planning problems may be most difficult in specific sectors, such as smaller businesses and university departments where staff replacement is a more difficult issue.

Easily exaggerated

The uncertainty created by banning mandatory retirement is easily overdrawn. In larger organizations, retirement decisions can be predicted statistically. In any organization the uncertainty associated with retirement decisions is much smaller than those associated with absenteeism, strikes, turnover, or competence. After all, it is fairly clear who may retire, while it is not clear who may be absent or resign. Uncertainties of this kind are an accepted part of managing any organization, and the inconveniences they create do not seem to warrant limitations on the rights of senior employees.

Greater Variety And Flexibility In Working Arrangements

Many observers claim that the dwindling practical importance of mandatory retirement rules and the growing prevalence of early retirement are facets of

a wider modern trend towards greater variety and flexibility in working arrangements to suit individual preferences. They see this trend on one hand in the growth in appreciation and recognition of individual and minority group rights and in the proliferation and acceptance of variety in lifestyles generally. On the other hand they also see it in the development of new principles and techniques of management that allow centralized control without regimentation and that stress the importance of individual motivation and expression in maintaining productivity. This broad trend emphasizes rights and freedoms.

An anachronism

For these observers mandatory retirement increasingly resembles an anachronism, a historical residue of an earlier era in industrial organization. It is not only becoming irrelevant in practice but also losing any symbolic value it may once have had. Before long, a ban may seem an afterthought.

Experience With Bans In Other Jurisdictions

Introduction

In weighing the possible effects of a ban, Ontario can look to the experiences of the many other jurisdictions that have already prohibited the practice or are in process of doing so. Though different kinds of exceptions are often made, mandatory retirement has been banned in other provinces: New Brunswick, Quebec, and Manitoba. The federal government is at present abolishing mandatory retirement in areas of its jurisdiction. As of 1986, mandatory retirement has been abolished by the American federal government. The Task Force has looked into the results to date of these bans.

Other Provinces

New Brunswick was the first Canadian jurisdiction to ban mandatory retirement when it did so through the Human Rights Code in 1973. In Manitoba, amendments to the Human Rights Act in 1974 led to legal challenges and court decisions that by 1982 had effectively abolished mandatory retirement. In Quebec, mandatory retirement was banned by Bill 15, whose regulations were enacted in December 1983.

In all three cases the ban appears not to have had much effect on retirement practices. The proportion of the total labour force working past age 65 in all three provinces has remained less than 1 per cent, a level in

line with the earlier estimates for Ontario. The trend, as in Ontario, is towards earlier rather than later retirement.

The ban is not generally regarded in these provinces as having caused problems, though for somewhat different reasons. In New Brunswick the prohibition exempted organizations where employees were covered by pension or retirement plans. This large exemption means that for a significant proportion of employees, especially for organized labour, there is no ban and mandatory retirement still exists. Both labour and management in New Brunswick argue that eliminating this large exemption and banning mandatory retirement altogether would have disruptive consequences.

In Manitoba and Quebec, where the ban is general and has so far worked well, there is some unease about future consequences if economic conditions change. Manitoba respondents cautioned that a recurrence of high inflation rates might encourage delayed retirement among a wider portion of the work force whose pensions are not indexed to inflation. Small businesses in Quebec expressed deep concern that a future increase in delayed retirement could be harmful to them, expecially to those businesses lacking private pension plans.

The Federal Government

After an extensive process of public consultation and policy analysis the federal government has decided to prohibit mandatory retirement generally in areas of its jurisdiction and is already implementing the change. For those public servants and employees of federally appointed boards, commissions, and corporations covered by the Public Service Superannuation Regulations, mandatory retirement came to an end in July 1986 with an amendment to those regulations. Other statutes relating to particular occupations, such as certain federal appointments to commissions and tribunals, are at present being examined individually. In some cases a fixed retirement age might be replaced with renewable term appointments.

The prohibition is not universal in the public service: mandatory retirement is retained in certain occupational categories, such as the RCMP, the armed forces, and the judiciary. The federal government also has broad constitutional authority over certain areas of economic activity, such as banking and interprovincial transportation. In these areas it is expected that mandatory retirement will be abolished by a proposed amendment to the Canadian Human Rights Act.

Enforcement will be up to the courts. No attempt will be made to eliminate an employer's right to make a legal claim that for a particular occupation a fixed retirement age is essential, as a "bona fide occupational requirement" (discussed later). Moreover, employees in federal jurisdiction

will always be able to contest a fixed retirement age as a violation of Section 15 of the Charter.

An important aspect of these federal changes is the likelihood of a transitional period during their implementation. Both employer and employee organizations stressed the need for time to review the implications for the industrial relations system, of which mandatory retirement has tended to be an integral part.

The federal prohibition is more than just an external example for Ontario to consider. A large proportion of the employees it will affect work in the province. If Ontario does not make a similar move, Ontarians will find themselves working in two different retirement regimes.

The United States

In areas of federal jurisdiction in the United States changes to retirement practices have been imposed by amendments to the Age Discrimination in Employment Act. In 1978 the mandatory retirement age was raised from 65 to 70. Then in December 1986 the cap was removed altogether so that mandatory retirement was abolished except for university professors, fire fighters, and law enforcement officers. It is of course too early to describe the effects of this overall prohibition, especially since it may be challenged in court as violating states' rights.

Many states had banned mandatory retirement in earlier years, and by 1986 only ten states still allowed the practice. The Task Force has examined the effects of earlier bans in New York, California, and Michigan. In these states the consequences of prohibition have been small, though the leading concerns expressed appear to differ a little.

In New York there was a greater effect from an earlier raising of the retirement age from 65 to 70, perhaps pre-empting the effects a ban would otherwise have had. In some sectors, such as the garment industry, working past the normal retirement age has been relatively common because historically low wages and delayed evolution of retirement and pension plans have made it an economic necessity.

In California the impact of prohibition has been reduced by a strong tendency to early retirement, in spite of growing concern about social security at a time of mounting health care costs. In Michigan, the impact of the ban has been limited by the fact that the previous mandatory retirement age was 70 rather than 65 and by the downsizing trend in the dominant auto industry, which has stressed incentives for early retirement.

Lessons Elsewhere

Experience outside Ontario suggests that the prohibition of mandatory retirement is common both in legislation and in judicial decisions. It has generally not been disruptive so far because there has been a strong trend towards earlier rather than later retirement. There is some fear that changed economic conditions might reverse the trend and encourage delayed retirements, with possibly harmful results. Moreover, in most cases the elimination of mandatory retirement has happened so recently that long-term effects may not yet be discernible.

However, as in Ontario, the question whether mandatory retirement should be allowed is generally a very small issue, entirely overshadowed by concerns about retirement income security and pension plan equity.

To Ban Or Not To Ban

Goal And Objective

What goal should the government strive for in considering possible action?

The consensus of the Task Force, which is expressed without reservation, is

- that the goal of any social policy initiatives in this area must be fairness, with special concern for groups that suffer from inequities in the status quo, and
- that, in relation to retirement, to achieve the goal of fairness the major objective must be to provide maximum flexibility for those in our society who are planning for, or confronted with, the retirement decision.

A concern for fairness and flexibility has therefore guided the conclusions and recommendations of the Task Force on the various questions before it.

Conclusions On Prohibiting Mandatory Retirement

The Task Force believes that the status quo is unacceptable in important respects. Arbitrary retirement practices are generally objectionable not only to the Task Force but also to a broad cross-section of the public. Such practices are inconsistent with major trends developing in Ontario and across Canada and appear sadly out of step with the growing concern and recognition of individual rights.

Yet the existence of mandatory retirement does not represent a burning social issue for most people in Ontario. In fact the evidence sometimes suggests that the question of a ban may well have been overtaken by events and that its days may be numbered in any case.

The evidence gathered by the Task Force shows that mandatory retirement has become largely symbolic as an issue, and is not an especially acute issue at that. For this reason the members of the Task Force are divided on whether the government should take action to ban it.

The chairman of the Task Force supports a formal ban. He believes that Ontario legislation to eliminate mandatory retirement would put to rest a number of uncertainties regarding the status of such rules in light of the Charter and would avoid the disquiet, hardship, and costs that will inevitably accompany ongoing challenges to these practices in the courts. His view is that a ban would precipitate a number of innovative and imaginative policies facilitating early retirement, voluntary reductions in work responsibilities for seniors, improved pension plans, and a more flexible approach to the whole question of retirement.

The two other members of the Task Force believe that since such a relatively small number of people are affected by current practices, a more gradual approach to changing the status quo is preferable at the present time. They believe there should be no formal government action for abolition because it is unnecessary and not widely demanded and because not enough time has passed to allow a reasoned evaluation of the experiences of jurisdictions that have imposed bans. Instead other initiatives could and should be taken to ensure greater flexibility in retirement and to allow individuals, in appropriate circumstances, to carry on beyond age 65.

The individual comments of the members of the Task Force on the question of banning mandatory retirement are presented in Appendix A.

Part Two

How Would A Ban Be Implemented?

Introduction

A decision by the Ontario Government to prohibit mandatory retirement would raise issues in two areas:

Enacting the ban

- should anyone be excepted from the ban?
- should there be a transition period?
- what should be the banning mechanism?

Accommodating the ban

- should pension plan rules be changed?
- is a new system for settling dismissal disputes desirable?

The Task Force has looked into these issues and has agreed on a number of conclusions and recommendations.

Enacting The Ban

Any possible harmful effects of a ban can be reduced by the manner in which it is enacted, particularly through designated exemptions and an introductory transition period.

Exceptions To A Ban

The Task Force has identified three types of exceptions or exemptions that might be considered as limitations on a ban:

- except with pension plans in collective agreements
- except where BFORs (bona fide occupational requirements) exist

- except in special cases.

The legal acceptability of such exceptions under the Charter must also be considered.

Except with pension plans in collective agreements

An exception for pension plans in collective agreements, as in New Brunswick, would be based on two grounds. First, the mandatory retirement rule in such cases is regarded as the outcome of a freely negotiated contract binding and affecting only the parties to the contract. As such it represents part of a mutually advantageous set of tradeoffs on all sides, including the different interests within the union such as older and younger employees. The affected employees have not been deprived of rights but rather have chosen not to exercise them in order to gain other benefits.

The second ground sometimes advanced for this exception is that the pension plan requirement should ensure that financial hardship is not involved. However, there is no minimum level of pension benefit to qualify for this exception, so that mandatory retirement would still exist for many whose pension benefits were insufficient to provide income security.

The incorporation of this exception would remove from the ban a significant proportion of the work force: about 70 to 80 per cent of unionized employees in the province. These employees work in situations where mandatory retirement is least felt to be burdensome. The Task Force notes that both management and the labour movement have expressed opposition to a ban.

Except where BFORs exist

Most Canadian human rights legislation contains an exception from the prohibition of discrimination in employment that applies whenever the discrimination is the result of a reasonable or bona fide occupational requirement or qualification (hence sometimes BFOQ). In relation to mandatory retirement the idea is that in certain occupations advanced age may be a disqualification for continued employment.

This exemption is potentially available in any case through the courts, where the the jurisprudence indicates that an age-based exception for an occupation may be difficult though not impossible to establish. The exemption appears to be accepted by the courts only in relatively narrow circumstances within a given occupation and then only if considerations of safety, particularly public safety, are involved. The onus is on the employer to persuade the court of the need for an exemption based on age.

Except in special cases

Three particular cases were repeatedly cited before the Task Force as potential exceptions to a ban: firefighters, judges, and university professors.

Reasons have been given why mandatory retirement should remain in effect in these cases.

The retention of mandatory retirement for judges in Ontario is advocated on the ground that measures to identify individual judges whose competence should be questioned or tested would undermine judicial independence. The concern is probably as much that abuse will appear possible as that abuses will actually occur. However, against this concern it may be noted that judges are already subject to evaluation in the course of complaint investigations or removal proceedings.

Because of the variety of jurisdictions and rules that apply to the judiciary, the retirement ages of judges in Ontario range at present from 65 to 75. The judges of the Supreme Court of Canada, the Superior Court of Ontario, and County and District judges are under federal jurisdiction. The Constitution Act sets a retirement age of 75 for justices of the Supreme Court of Ontario, a rule that could only be changed with a constitutional amendment. However, Provincial Court judges are within provincial jurisdiction and potentially subject to a provincial ban on mandatory retirement.

Universities argue that faculty positions should remain subject to mandatory retirement. The historical circumstance of heavy hiring in the 1960s and early 1970s, combined with the subsequent contraction of university funding, has in many faculties virtually put an end to current hiring. Unlike most employment, tenured faculty positions are generally one for one, that is, barring a net expansion of the system, a new junior person cannot be hired until a resignation or retirement occurs.

In the universities' view, a lack of turnover and new blood in faculty rosters threatens to lead to a deterioration in vitality and innovativeness and is impairing the careers of a whole generation of potential teachers who deserve to be given an opportunity to pursue their teaching and research careers.

In 1986 when amendments to the U.S. Age Discrimination in Employment Act effectively prohibited compulsory retirement, tenured post–secondary teachers were expressly exempted. The reasons given for this special treatment are to avoid:

- reductions in the hiring of younger faculty including minorities and women
- difficulties for university budget planners in immediately adjusting to increased costs for older faculty choosing to remain past the normal retirement age
- difficulty with maintaining tenure arrangements.

Similar views are advanced by Canadian universities.

These opinions are naturally not shared throughout university faculties, and a number of legal challenges to forced retirement are at present before Canadian courts. The question remains controversial within the university community.

Conclusions and recommendations

The option of banning mandatory retirement but exempting bona fide pension and retirement plans is not advisable. Because the exemption could be larger and more significant than the prohibition itself, the result would be much the same as no ban at all. The Task Force thus recommends:

1 *that a ban not exempt employees on the grounds that they are members of bona fide pension or retirement plans.*

As for exceptions based on BFORs under the Ontario Human Rights Code, the Task Force sees merit in how the courts have been deciding such cases. The difficulty facing employers making such a claim protects senior employees against gratuitous age discrimination and restricts an arbitrary retirement age to employee groups where a possible risk to public safety can clearly be demonstrated. This system works well. The Task Force recommends:

2 *that the Ontario Human Rights Code should still allow employers to claim the right to discriminate on the basis of age where it can be established as a bona fide occupational requirement.*

Three occupations in which there has been a tendency to accept that age is a bona fide occupational requirement and which have often been exempted from bans in other jurisdictions are firefighters, law enforcement officers, and prison guards. The Task Force sees merit in this exemption and recommends:

3 *that certain occupations be exempted on grounds of public safety and that firefighters, law enforcement officers, and prison guards be expressly exempted from a ban at this time.*

The reasons for exempting judges and tenured faculty from a ban carry weight with the Task Force, which recommends:

4 *that current retirement provisions for provincial judges be maintained,*

5 *that tenured faculty be exempted from a ban for a five-year trial period and that during this period the Ontario Council of University Affairs study the age profile of tenured faculty and retirement practices and report back to the Premier before the conclusion of the trial period.*

A decision on whether to continue the exemption for tenured faculty can be made at that time based on the OCUA report or on any significant

changes in government policy regarding faculty complement. The first three years of this five-year trial period for tenured faculty would correspond to the transition period that should accompany the general introduction of a ban.

Transition Period

For reasons explained earlier, the Task Force does not expect that a ban on mandatory retirement would turn out to affect the retirements of more than a small portion of the working population of Ontario. However, about half the jobs in the province are subject to mandatory retirement, so that a ban would have very widespread administrative effects of adoption and accommodation.

The effects on pension plan rules in particular would probably have to be controlled by new legislation developed for the purpose. Where mandatory retirement must be dropped from collective agreements, the bargaining process would have to adjust its tradeoffs. To ease these accommodations and adjustments, a phase-out period for mandatory retirement is desirable.

Proceeding cautiously would allow the government and the private sector generally to prepare for the changes in a timely and orderly manner.

The Task Force believes that a ban ought to be accompanied by a phase-in or transition period. It recommends:

6 *that the enactment of a ban should specify a three-year interval before it comes into effect.*

This period will allow the required adjustments to be identified and implemented.

The Banning Mechanism

The motivation behind a ban would be an acceptance that mandatory retirement is unfair to people because it constitutes age discrimination. In this view the use of a particular age to designate incompetence or disqualification for continued employment is in the same category as the use of skin colour or gender for the same purpose. It is held to be an invasion of human rights to which all individuals are considered equally entitled.

Since a move to eliminate mandatory retirement would be taken to secure human rights, the Task Force believes it would be appropriate for the mechanism to be an amendment to the Ontario Human Rights Code and thus recommends:

7 *that the Ontario Human Rights Code be amended to remove the upper age limit on its prohibition of age discrimination and that this measure be stated to be intended to ban mandatory retirement practices.*

Further, to give effect to the transition period and the exceptions,

8 *that the amendment be stated to come into effect in three years' time and that tenured faculty be exempted for a two-year interval beyond the transition period.*

It appears to the Task Force that the short-term prolongation of the limit on freedom represented by the transition period would prove acceptable under Section 1 of the Charter if challenged in court. However, to avoid wasteful court challenges to the transition period before the ban comes into effect, a legislative override of the Charter is advisable. The Task Force recommends:

9 *that the amendment invoke the legislative override provision in Section 33 of the Charter in support of the transition period as well as in support of the exceptions to the ban.*

This override would expire in five years and thus would cover the transition period and the trial exemption interval for tenured faculty. From then on the override could be re-enacted as required.

Amendments to other legislation and regulations

To bring other legislation and regulations in line with the amended Human Rights Code, a ban should be accompanied by additional amendments.

In particular, the Ontario Employment Standards Act states that it does not apply to a person who has reached the age of retirement according to the established practice of the employer and has had his or her employment terminated. This exception is inconsistent with a prohibition on mandatory retirement. Thus the Task Force recommends:

10 *that the limitation in the Ontario Employment Standards Act restricting the Act's effect to employees who have not reached an employer's established age of retirement be deleted by amendment and that other Ontario statutes also be amended as indicated in Chapter 15 of Appendix E.*

Accommodating The Ban

The main area of adjustment expected if mandatory retirement is prohibited is in pension plan and other benefit rules. A second area concerns the settlement of dismissal disputes.

Changes To Pension Plan Rules

As noted earlier, the common connection between mandatory retirement and pension plans has caused fears that banning one might threaten the other.

However, as the Task Force has stated, the future of pension plans is quite independent of the fate of mandatory retirement. A pension plan requires only the establishment of a "normal retirement age" on which to base its structure. A person can continue to work past the normal retirement age but the pension plan rules may change.

These pension plan rules can be adjusted to discourage continued work just as effectively as an arbitrary retirement age. For this reason the Task Force believes that for a ban of mandatory retirement to achieve its objective, it must be accompanied by legislation controlling changes to pension plans.

A further issue is raised for long-term disability and other employee benefit plans, which customarily terminate at a compulsory retirement age.

The Task Force had reached certain conclusions regarding pension plan regulation prior to the June 1987 amendments to the Ontario Pension Benefits Act. The Task Force is pleased to note that these amendments incorporate many of its conclusions.

Pension plan options

There are two aspects of pension plan structure to consider in relation to retirement postponed past the stipulated normal retirement age:

- accrual of benefits: an increase in an employee's total entitlement, in accordance with (depending on plan design) continued contributions, investment returns to the pension fund, increases in average and final earnings, and total number of years worked. The relative importance of these factors varies between plans.

- actuarial adjustment: when retirement is early or postponed, a decrease or increase respectively in the annual rate of payment for a given entitlement based on the employee's life expectancy and current interest rates, so that on average the employee should receive the full entitlement by the time of death.

These two aspects determine how large the pension payments are; the longer benefits accrue and the later the occurrence of retirement and pension commencement, the higher the payments.

The effect of the actuarial adjustment can be larged; if a man age 65 with an average life expectancy of 15 years postpones his retirement from age 65 to age 70, the pension will be paid for only 10 instead of 15 years. The actuarial adjustment alone might increase his pension payments by 50 to 80 percent, depending on interest rates and details of the pension plan. The same effect acts in reverse to reduce the annual payments on early retirement if they are on an actuarial basis.

In the case of an employee in a pension plan continuing to work past the normal retirement age, the pension plan rules can adopt one of four options:

i no further accrual of benefits; no actuarial adjustment to increase payments

ii continued accrual; no actuarial adjustment

iii no further accrual; actuarial adjustment

iv continued accrual; actuarial adjustment.

These options are ranked in order of increasing generosity and thus increasing cost. Option 1 is a clear disincentive to continued work because the plan member working past the normal retirement age simply forfeits pension payments. Option 2 offers some flexibility because the benefits will depend on such factors as continued contributions, investment returns, and the size of wage increases in final years. If in a particular plan these factors do little to increase benefits, there may be a disincentive to continuing work. An employer wanting an employee to stay on can ensure a positive incentive by adjusting the factors that determine individual benefit levels.

Option 3 offers neither an incentive nor a disincentive to continued work and merely prorates payments to expected lifespan. Option 4 is a very strong incentive to continued work and is correspondingly costly and uncommon in practice.

Conclusions and recommendations

Of these options the first and last may be easily dealt with. Option 4 is so costly that it cannot be put forward as a legislated minimum standard. In contrast, Option 1 is so ungenerous to the employee as to be in effect equivalent to an arbitrary retirement age and thus to conflict with the intention of a ban. The Task Force has found that jurisdictions where mandatory retirement has been banned have also prohibited the use of Option 1. The Task Force believes that in case of a ban Ontario should do the same and therefore notes with approval that the Ontario Pension Benefits Act has been revised to require that pension plans provide at least for continued benefits accrual when retirement is postponed.

The real choice is between Options 2 and 3, that is, between continued accrual alone and actuarial adjustment alone. Option 3, actuarial adjustment alone, can be considered neutral and fair in the sense that the total benefits paid out to an employee are on average unaffected by the years of continued work. When pension payments begin, they are increased to account for the fewer remaining years of expected pension-drawing. Of course employees who die earlier than average will lose, while workers living longer than average will gain. But this is true in any pension plan.

Option 2 will on average be less generous to employees than Option 3 because the normal rate of benefit increase usually does not raise payments as quickly as they should rise on actuarial grounds through the reduction in pension-drawing years. However, large wage increases in final years could reverse the comparison, so that an employer could make Option 2 more generous in specific cases.

The generosity of Option 2 depends on the plan and the individual member. A plan where benefit levels are strongly influenced by the number of years worked will be more advantageous to long-service employees than short-service ones. But members of defined benefit plans who have accumulated the maximum pension credits allowed by Revenue Canada may gain nothing from Option 2. The arbitrary aspect of entitlements under Option 2 is an argument against it in the view of the Task Force.

The lower overall cost and the increased flexibility to retain the services of highly valued employees by large wage hikes would lead many employers to prefer Option 2. In general, however, with Option 2, though benefits would increase, employees postponing retirement would tend to lose deferred income because they would be unable to draw large enough payments to compensate for the fewer pension-drawing years before their deaths.

Apart from generosity, Option 3 has an additional advantage from the standpoint of flexibility for the retiring employee. Under Option 3 it would be straightforward to allow an employee electing to continue working on a part-time or reduced-load basis to begin withdrawing the accumulated pension at a rate that would "top up" the reduced employment income to the previous level. This capability is provided to employees by Bill 15 in Quebec, though only to the extent necessary to offset a decline in income that would otherwise occur.

The Task Force sees Option 3 as corresponding to its goal and objective of ensuring fairness and flexibility in retiring. Nevertheless, the Task Force does recognize the rationale, as a legislated minimum standard, for Option 2, whereby an employee has the right to continue to accrue benefits. The 1987 amendments to the Ontario Pension Benefits Act do require Option 2. The Task Force in addition recommends:

11 *that when retirement is postponed after the normal retirement age the employee may require that pension payments commence in whole or in part to the extent necessary to compensate for any reduction in income as a result of changed work conditions or responsibilities.*

Disability and other benefits

Ordinarily benefit plans state that disability benefits cease at the normal retirement age. When banning the use of an arbitrary retirement age, it

would be desirable to ensure that disability benefits continue until full pension begins, on the expectation that the employee would have worked that long. Yet it seems generally accepted that disability benefits cannot be expected to be paid after the normal retirement age.

For disabled long-service employees this could mean shifting from disability benefits to pension benefits before the normal retirement age, as soon as they qualify for full pension benefits. For disabled short-service employees with limited accrued pension benefits, it means maintaining disability benefits until the normal retirement age stipulated in the pension plan, at which point pension benefits replace disability benefits. Experience in other jurisdictions has shown this formula to work effectively.

The Task Force thus recommends:

12 *that legislation be enacted stating that disability benefits cease as soon as, but not before, the disabled employee becomes eligible for full pension or attains the normal retirement age stipulated in the plan.*

13 *that in the case of disability occurring during postponed retirement — that is, after the normal retirement age — the benefit period be limited to two years or the attainment of age 71, whichever is earlier, at which point pension benefits commence.*

When an employee chooses to continue working past normal retirement age, fringe benefits should also generally continue: life insurance, travel accident insurance, dental insurance, sick pay, stock purchase plans, and so on. However, where insurance costs are age-related and rise, a reduced benefit schedule should be allowed to equalize the employer's cost by age. The Task Force thus recommends:

14 *that legislation be enacted to state that for employees working past normal retirement age all previous benefit categories continue and, where age-related costs increase, the benefits be reduced in scale to equalize the employer's costs by age.*

Settlement Of Dismissal Disputes

If mandatory retirement is banned, how would dismissal disputes about alleged age discrimination be settled? Would a special tribunal be needed or desirable?

Current mechanisms

A prohibition of mandatory retirement by an amendment of the Ontario Human Rights Code indicates that the appropriate mechanism would be a claim for wrongful dismissal on account of age discrimination before the Ontario Human Rights Commission. However, the remedies under the Code do not include civil damages.

At present a dismissed employee can bring a civil claim for damages from wrongful dismissal in common law.

As well, a dismissed employee can always bring a claim of discrimination on the basis of age under the Charter, although these actions have so far had limited success. These remedies would continue to be available were mandatory retirement to be banned. The experience in other jurisdictions when mandatory retirement has been banned has shown no significant rise in the incidence of unjust dismissal cases. Accordingly, the Task Force does not recommend any changes in the current mechanisms for settling dismissal disputes.

A special tribunal?

As for the creation of a special tribunal responsible for dismissal disputes where age discrimination is an issue, the Task Force concludes from its research findings that there would probably not be any constitutional impediment to such an establishment. A tribunal will therefore remain an option for the Ontario Government in future.

In the absence of mandatory retirement a dispute settlement tribunal would be desirable if either of two conditions were met:

- the costs of presenting a case before the Ontario Human Rights Commission were large and likely to impose a disproportionate burden on either employers or employees
- the number of cases were to rise significantly beyond present levels, overloading the Ontario Human Rights Commission.

The Task Force does not expect either condition to occur if mandatory retirement were eliminated. The Task Force believes that the option of proceeding before the Ontario Human Rights Commission offers neither undue opportunities nor undue obstacles to either side. Furthermore, as discussed earlier in this report, the Task Force does not expect postponed retirement to be a widely attractive and heavily chosen option.

The Task Force thus does not recommend the creation of a special dispute settlement tribunal as part of any abolition "package" on mandatory retirement. Yet if future events lead to one or both of the above conditions becoming an aggravation in Ontario, the government's way would be open to creating a tribunal at that time.

Part Three:

Apart From A Ban, What Can Be Done?

Introduction

While examining whether and how to ban mandatory retirement, the Task Force also identified a number of additional steps the government could take, whether or not a ban is imposed, to make the process of retiring from work fairer and more flexible for people in Ontario.

These measures concern retirement support and counselling, encouragement of part-time work and work sharing, and elimination of OHIP premiums at age 60.

Retirement Support And Counselling

The Task Force believes that the Ontario Government is in a position, and should use that position, to exercise strong moral suasion in support of more flexible retirement practices in the province. At the same time the Ontario Government is able, as an employer itself, to set an example for the private sector among its own public servants. Thus the Task Force recommends:

15 *that the Ontario Government express public support for, and announce a policy of, encouraging all measures that give greater flexibility in retirement arrangements to employees in Ontario generally and to Ontario public servants particularly.*

In relation to retirement policy the Ontario Government should lead rather than follow the private sector.

One area in which the moral effect of this leadership might be especially effective is retirement counselling. Permeating discussions of mandatory retirement is the notion of an abrupt shift from full-time work to full-time leisure and a recognition of the psychological shock that often follows. For many people the elimination of an arbitrary retirement age is one way to mitigate that shock. Another way to ease the stress of sudden disengagement from work is to help senior employees prepare themselves for retirement. The Task Force therefore recommends:

16 *that a retirement counselling program be further developed and offered to all Ontario public servants.*

Encouragement Of Part-time Work And Work Sharing

The best way to ease the shock of retirement, both psychological and economic, is to replace an abrupt change by a gradual phase-out of work activity. The Task Force has found consistent support among seniors for the concept of allowing and encouraging gradual reductions in workload among senior employees at their chosen pace instead of a peremptory formal "retirement" that in a single day jettisons them into an unknown and very different future.

The option of part-time work for senior employees would help many people enter their post-retirement years voluntarily and with dignity. Indeed there are many signs that it is precisely this desire to control the retirement process that motivates the growing trend to early — but thereby voluntary — retirement.

Reductions in workload

From the employer's standpoint, offering senior employees opportunities for a reduced workload extending over the years before and after the "normal retirement age" means making arrangements for a greater degree of work sharing among employees. Whether or not mandatory retirement is formally banned, a more widespread development of such arrangements is desirable. The Task Force thus recommends:

17 *that the government explore ways and means by which the Employment Standards Act can be amended so that those who have completed a certain term of office are given an entitlement to voluntary reductions in their work time (with a proportional reduction in pay) and the option of contributing to their pension funds at the full-time rate, that is, to top up their employers' contributions.*

The costing of employee benefits and holidays

An existing disincentive to part-time work is the practice of costing fringe benefits and holidays on the pay of full-time employees. The Task Force believes that part-time and full-time employees should be placed on the same basis in the calculation of the employer.

The Ontario Hospital Insurance Plan requires participants to pay standard premiums up to age 65. The premiums are constant regardless of income.

Employers frequently pay all or part of the OHIP premiums as an employee benefit. Since these payments represent a fixed cost per employee,

they add disproportionately to the costs of employees with part-time or reduced work loads. The result is a disincentive for employers to encourage flexibility and work sharing arrangements for employees who may wish to phase-in an early retirement.

Noting that the Canada Pension Plan allows pensions to begin at age 60, the Task Force believes that a reduction or elimination of OHIP premiums at that age would encourage fairness and flexibility for senior employees in arranging early retirement or part-time or reduced work loads.

The Task Force therefore recommends:

18 *that the government explore ways and means to encourage part-time work and to facilitate early retirement, such as requiring that benefits, holidays, and vacations be provided based on hours worked and reducing or eliminating OHIP premiums for those retiring before age 65.*

Appendices

Appendix A

Comments Of Task Force Members On A Ban

Comments of Ron Ianni

The members of the Task Force believe that the goal of public policy in this area should be to ensure fairness to employees making retirement decisions and that the single most important way to ensure fairness is to provide maximum flexibility in these decisions.

From the standpoint of fairness and flexibility, the Task Force regards the status quo as unacceptable. Changes should be made in a number of areas, particularly pension plans and part-time work regulations and practices. We outline options and make recommendations for action by the Ontario Government on the implemention of a prohibition of mandatory retirement as well as on issues related to mandatory retirement but independent of any action on a ban.

We have found that the basic question whether mandatory retirement should be banned is not a burning social issue, though it is sometimes the subject of strongly expressed opinions. The growing trend to voluntary early retirement has made compulsory retirement at an arbitrary age a concern to a diminishing proportion of the work force. Much public reaction to the inquiry suggested that the Task Force had been overtaken by events and the days of mandatory retirement were already numbered.

The central question whether the Ontario Government should legislate a ban on mandatory retirement was one issue on which the members of the Task Force were divided and unable to agree upon a recommendation.

It is my belief as Chairman that the Ontario Government should abolish mandatory retirement, using the implementation program outlined in this report. Clear government policy and action would put to rest a number of uncertainties about the status of mandatory retirement in light of the Canadian Charter of of Rights and Freedoms and would avoid the disquiet, hardship, and costs that inevitably accompany ongoing challenges to these practices in the courts. Indeed, in this context, it is more appropriate for the government to formulate social policy than the courts. A ban of mandatory retirement would precipitate, in my view, innovative and imaginative policies facilitating early retirement, reduced workload arrangements, improved pension plans, and a more flexible approach generally to the whole question of retirement. Examples of these new policies are already visible in some sectors.

Daniel Damov and Heather Webster, while they oppose in principle the concept of mandatory retirement, and are in agreement on how a legislated ban ought to occur if the government were to choose to do so, nonetheless

believe a legislated prohibition to be undesirable. Their view is that since a relatively small number of people are affected by current practices, a more gradual approach is preferable. Instead of a formal ban, they would rather see initiatives taken to improve flexibility in making the retirement decision and to make it easier for individuals to carry on after age 65 in appropriate circumstances.

We trust that this report and the recommendations included in it, together with its analysis of the options open to the Ontario Government, will be of assistance to the government in the formulation and implementation of a new retirement policy.

Comments Of Daniel Damov

The Ontario Task Force on Mandatory Retirement, of which I have had the honour to be a member, conducted an extensive study of this subject. Our Report sets out the conclusions of the Task Force, with which I associate myself. Key to an understanding of the central issue are the following points:

1. Mandatory Retirement and particularly its banning is not a burning issue to a very large majority of people. What is of real interest to people is the availability of adequate pensions, protected from inflation and offering an early retirement option.

2. Flexibility in view of increasing numbers of people, the choice of retiring early (or late) should be available, to reflect our individual differences and preferences.

3. Working Life despite increased longevity and much better health, the vast majority of people do not wish to see their "normal" working life being prolonged.

On the basis of the evidence, working people and their employers would very much prefer to have a definite and known age at which a lifetime of work will come to a mutually acceptable conclusion. Working people and their employers want to be able to plan their lives, their financial security and their human resource requirements. The stronger affirmation of individual rights, under modern provincial and federal laws, does not eliminate the need to continue to respect collective rights and the necessity to have standards and norms of general application.

From a legal standpoint, a position can be based on one of two views:

- If one believes that the Charter of Rights does not make mandatory retirement illegal, no action to ban it is necessary. All that is necessary is to clarify the rules and to defend in court the occasional challenge.

- If one is of the opinion that the Charter of Rights does ban Mandatory Retirement, it will be necessary to enact laws which will permit retirement at an agreed normal retirement age.

From a social standpoint, it is important to remember that when retirement was first introduced, it was viewed as a progressive measure. It still is. Its purpose, historically and at present, is that it marks the end of a life of toil, the beginning of a new phase of well-earned rest. Its role is so important that if it did not exist, it would need to be invented.

My recommendation, therefore, is that a stated normal retirement age rule is necessary and should be retained. However, such a rule should set out the conditions under which retirement can take place at an earlier, or later, than normal age, as may be agreed by the parties to an employment contract. The time of an automatic, non-discretionary rule on mandatory retirement is past. There is a clear need to provide for flexibility and choice to be available to those, relatively few, who would wish to be able to work longer than normal retirement age.

Retaining a normal retirement age, with adequate provision for flexibility in individual cases, would be much more in tune with the stated and observed preferences of the large majority of working people, in all categories of employment and walks of life. This does not negate the importance of work as an affirmation of our sense of self-worth, nor does it ignore the need and desire of most people to continue some involvement in a meaningful and productive activity. The key point is that, after attaining retirement age, people want to have the economic security which would enable them to choose freely in what direction to orient their energies, how to use their skills, and at what pace to conduct their lives. To continue working at the same occupation, in the name of non-discrimination because of age, is to the vast majority of people an unwelcome postponement of a new phase in life, a time of change and self-renewal.

Comments Of Heather Webster

The Task Force on Mandatory Retirement has correctly identified the disireability of "flexibility" with regard to the retirement decision and noted that fairness of treatment should be accorded those who choose "early" or "delayed" retirement. The phasing out of employment rather than the abrupt cessation of work is also identified as a positive goal. The adequacy of post-retirement income and the pursuit of meaningful post retirement activity are seen by seniors, and by the Task Force, as much more important than the actual age of retirement.

In fact, the lack of significant response to the Task Force's public hearings shows that mandatory retirement is, for most people, essentially a "non-issue." The Task Force was able to identify only two groups who seek the elimination of mandatory retirement: a small group of upper income, high status white collar professionals who seek to maintain their positions, and the "pension-poor" — older workers, quite often women, who seek to continue working out of sheer economic necessity.

While there was little mention of the "human rights" aspect of the mandatory retirement issue during the public hearings of the Task Force, this question has become, and I think quite mistakenly, a central focus of the Task Force Report. There is, of course, a heated debate in legal circles as to whether or not mandatory retirement constitutes age discrimination, and compelling arguments can be made on *both* sides of the issue. It is *not* imperative, however, that the Government of Ontario anticipate the legal outcome of this debate and attempt to pre-empt the judicial process.

Social policy decisions should be made on the basis of a reasonable assessment of the actual and potential impact on society, and defended on principle, not on the basis of a perceived necessity to get "on side" with "popular trends."

Thus it is my recommendation that the Government *not* legislate a ban on mandatory retirement. There is simply no compelling reason to act at this time, especially in view of the still largely unanswered questions about the potential impact of a ban. Research undertaken by the Task Force designed to assess the impact in Ontario of a mandatory retirement ban is not conclusive. It provides no easy answers and suggests no firm conclusions one way or the other. While no major repercussions have been noted in those jurisdictions where a ban has been imposed, it should be cautioned that too little time has passed to make a final judgement. Furthermore, the concern was raised repeatedly during the course of our Research by those interviewed that if greater numbers of workers elect to postpone retirement, significant problems are expected to arise.

But even if employment is not adversely affected in a major way, and even if fears about employee monitoring and unjust dismissal claims are never realized, there are still major issues outstanding which signal the necessity of a cautious approach. For example, who will pay for the inevitably increased cost of employee benefits given an aging working population? What effect will a ban on mandatory retirement have on the payment of entitlements under existing income security programs such as the Canada and Quebec Pension Plans? It is well to remember that mandatory retirement in the United States was eliminated largely as a way to restrain social spending in the face of conservative outcries about the cost of social

security. This response would be quite inappropriate in a province like Ontario which prides itself on being a progressive society.

It must also be cautioned that a ban on mandatory retirement represents an intervention in the collective bargaining process which will not be welcome by either of the parties in the a collective agreement. A legislated ban would supersede voluntarily negotiated contracts and might set a dangerous precedent, unless of course Ontario adopts a compromise solution such as that which exists in the province of New Brunswick. The Task Force rejects, perhaps prematurely, any kind of compromise position.

It is asserted by some who oppose mandatory retirement that if mandatory retirement were to be retained it would result in "severe financial hardship for certain people." It is, of course, not the existence of mandatory retirement which causes hardship — it is the existing pension and income security system which is to blame. The Government of Ontario might want to consider legislation formerly in effect in New York State where workers who did not have a certain level of income security could not be forced to retire from employment. While this legislation answers some concerns it still has the effect (as does a complete ban on mandatory retirement) of simply allowing the working poor to "die with their work boots on."

Inevitably, it is only through pension reform and minimum income guarantees that all the citizens of Ontario can be assured of a secure future. It is essential that pension reforms be implemented which provide full protection against inflation as well as complete portability and early vesting, and that plan sponsors be prohibited from appropriating surpluses. It is these initiatives that I urge the Government to take.

If the government *does* choose to legislate a ban on mandatory retirement — and especially if it does so in the name of "individual liberties" — it will be impossible to justify any but the most obvious exemptions to the legislation. Only those occupations where the safety of the individual or of the general public may be placed in jeopardy by postponing an employee's retirement can in fairness be singled out for special treatment. It follows as well that there can be no justification of any rules which penalize in any way those who choose to delay retirement. To do so would run counter to the spirit and intent of a legislated ban.

Appendix B

List Of Recommendations

Note: Recommendations 1 to 14 outline how a ban of mandatory retirement would best be implemented if the Ontario Government decided to do so. Recommendations 15 to 18 apply whether or not a ban is imposed.

Enacting The Ban

Exceptions To A Ban

1 that a ban not exempt employees on the grounds that they are members of bona fide pension or retirement plans.

2 that the Ontario Human Rights Code should still allow employers to claim the right to discriminate on the basis of age where it can be established as a bona fide occupational requirement.

3 that certain occupations be exempted on grounds of public safety and that firefighters, law enforcement officers, and prison guards be expressly exempted from a ban at this time.

4 that current retirement provisions for provincial judges be maintained,

5 that tenured faculty be exempted from a ban for a five-year trial period and that during this period the Ontario Council of University Affairs study the age profile of tenured faculty and retirement practices and report back to the Premier before the conclusion of the trial period.

Transition Period

6 that the enactment of a ban should specify a three-year interval before it comes into effect.

The Banning Mechanism

7 that the Ontario Human Rights Code be amended to remove the upper age limit on its prohibition of age discrimination and that this measure be stated to be intended to ban mandatory retirement practices.

8 that the amendment be stated to come into effect in three years' time and that tenured faculty be exempted for a two-year interval beyond the transition period.

9 that the amendment invoke the legislative override provision in Section 33 of the Charter in support of the transition period as well as in support of the exceptions to the ban.

10 that the limitation in the Ontario Employment Standards Act restricting the Act's effect to employees who have not reached an employer's established age of retirement be deleted by amendment and that other Ontario statutes also be amended as indicated in Chapter 14 of Appendix E.

Accommodating The Ban

Changes To Pension Plan Rules

11 that when retirement is postponed after the normal retirement age the employee may require that pension payments commence in whole or in part to the extent necessary to compensate for any reduction in income as a result of changed work conditions or responsibilities.

12 that legislation be enacted stating that disability benefits cease as soon as, but not before, the disabled employee becomes eligible for full pension or attains the normal retirement age stipulated in the plan.

13 that in the case of disability occurring during postponed retirement — that is, after the normal retirement age — the benefit period be limited to two years or the attainment of age 71, whichever is earlier, at which point pension benefits commence.

14 that legislation be enacted to state that for employees working past normal retirement age all previous benefit categories continue and, where age–related costs increase, the benefits be reduced in scale to equalize the employer's costs by age.

Retirement Support And Counselling

15 that the Ontario Government express public support for, and announce a policy of, encouraging all measures that give greater flexibility in retirement arrangements to employees in Ontario generally and to Ontario public servants particularly.

16 that a retirement counselling program be developed and offered to all Ontario public servants under the auspices of the Personnel Management Division.

Encouragement Of Part–time Work And Work Sharing

17 *that the government explore ways and means by which the Employment Standards Act can be amended so that those who have completed a certain term of office are given an entitlement to voluntary reductions in their work time (with a proportional reduction in pay) and the option of contributing to their pension funds at the full–time rate, that is, to top up their employers' contributions.*

18 *that the government explore ways and means to encourage part–time work and to facilitate early retirement, such as requiring that benefits, holidays, and vacations be provided based on hours worked and reducing or eliminating OHIP premiums for those retiring before age 65.*

Appendix C

Organizations And Individuals Participating In The Study

Adams, Mrs. Daphne
Andrew, Ms. Judith*
Baldwin, Mr. R.*
Baraner, Mr. John
Bar–Lewaw, Prof. Issac
Barnes, Mr. Leslie*
Bedard, Mrs. Eva
Belyea, Mr. A.E.
Billing, Mrs. Jerry
Boutros, Peter I.
Bourgeois, Ms. V.E.*
Boylan, Mr. Harold
Bradley, Mr. David H.*
Burns, Mr. Jay
Butcher, Mr. R.B.*
Campbell, Mr. Wm. D.
Chauvin Jr., Mr. T.
Connell, Dr. George E.*
Cooney, Jim*
Cooper, Mr. Fred
Cortis, Dr. Lucien
Cowan, Dr. John Scott*
Daniel, Dr. J.*
Dashney, Ms. Edith
Deigan, Mr. C.
Devlin, Mr. Gerald M.*
Dickirson, Mr. Leslie
Earp, Dr. Alan*
Eleen, Mr. John*
Epstein, Mr. Howard*
Evans, Mr. Clifford*
Fenn, Mr. Anthony N.
Ferguson, Mr. Peter L.*
Filsinger, Ms. Catherine*
Foucault, Mr. Andre*
Gallant, Mr. J.
Gardner, Eldon J.
Gerard, Mr. Leo W.*
Gill, Mr. Sym*
Hayek, Dr. E.J.
Hilliard, Mr. G.H.
Hoey, Prof. Thomas
Holder, Dr. Donald*
Hollinger, Mr. Benjamin
Jefferson, Ms. Christie (Velma Windus) (LEAF)
Joos, Mr. Arthur
Kelly, Mr. Wm. H.
Kempson, Mr. D.J.
Kluge, Mr. J.H.*
Korotash, Mr. Roman
Langdon, Mr. Larry*
Leblanc, Mr. Roger*
Martin, Mr. J.K.*
Matthews, Mr. B.C.*
McIntyre, Mrs. Edith
McGreevy, Mr. J.B.
McWhirter, Mr. W.J.
Miller, Mr. T.
Mills, Mr. Colin C.*
Monahan, Mr. Edward J.*
Mol, Prof. Hans
Moorthy, Mr. R.K.*
Morelli, Mr. Steve
Moss, Ms. Frances
Nicholson, Sister Lucie*
Pedersen, Dr. George K.*
Pennane, Mr. & Mrs. A.
Piccolo, Ms. Mina
Ratushny, Dr. Ed
Redman, Ms. Florence*
Reid, Mr. Patrick*
Roadburg, Dr. Alan*
Rose, Mr. Jeff
Rosehart, Mr. Robert G.*
Rostic, Mr. Allan H.
Saulitis, Mrs. R.
Schreiber, Mrs. Florence
Scott, Ms. Suzie*
Shulman, Mr. Norman*
Sinclair, Ms. Anne*
Starkey, Dr. John*
Stewart, Mr. James E.
Stockdale, Ms. Sue
Straford, Mr. H. R.*
Thibedeau, Mr. William
Thomas, Mr. Alan M.*
Vincent, Ms. Andrea L.*
Waigh, Mr. Roy A.L.
Walsh, Mr. Wm.
Waud, Mr. P.B.
Wetherimer, Mr. Leonard
Wilson, Mr. Benson A.*
Wright, Prof. Douglas*

* *Denotes individuals representing organizations.*

Appendix D

Background Paper: An Overview of the Issues

An Overview of the Issues

Note: This background discussion paper was produced by the Task Force at the beginning of the project and used in public consultation.

Introduction

The purpose of this summary is to assist those who will be preparing briefs and submissions to the Task Force on Mandatory Retirement. It will, as well, be useful in developing the work plan of the Task Force. In view of this purpose, many issues are raised regardless of their merits and without suggesting any judgment or opinion on the part of the Task Force. Many issues are raised in the form of questions. The reader is encouraged to communicate his or her comments to the Task Force office at the following address:

Dr. Ron W. Ianni, Chairman
Ontario Task Force on Mandatory Retirement
2 Bloor Street West, Suite 2001
Toronto, Ontario M4W 3E2
Telephone: (416) 963-3699

Terms of Reference

The Ontario Task Force on Mandatory Retirement has been established to study and make recommendations with respect to issues related to mandatory retirement, taking into account:

- the conflicting interests of older and younger workers;
- the appropriateness of automatic non-discretionary practices flowing from pension plans and from collective agreements;
- the ramifications of the abolition of mandatory retirement for personnel and human resources planning and practice; and
- the funding and design consequences for pension plans should mandatory retirement be prohibited.

In studying these issues the Task Force will consider the following perspectives:

- Why mandatory retirement has come to exist, including the identification of and rationale for any exceptions to the general practice. The Task Force will consider the role that mandatory retirement performs in the overall terms and conditions of employment
- The arguments for prohibiting mandatory retirement.
- The changes in legislation, regulations, and business practices that would need to accompany the prohibition of mandatory retirement if this were to occur. It may well be that the changes which would accompany the prohibition of mandatory retirement would vary significantly among different occupations.

Why has Mandatory Retirement Existed?

Many reasons have been cited to explain and defend mandatory retirement. Some are more important than others. The task Force expects to investigate these in as much detail as possible.

1. It has been argued mandatory retirement at a specified age provides for job security for seniors. If mandatory retirement were replaced with periodic job evaluations, some seniors who could not readily find alternate employment might be dismissed prior to the traditional retirement age. With mandatory retirement, a company may keep a soon-to-be retired employee even if his or her performance is unsatisfactory, simply because the remaining employment commitment is clearly limited. With a ban on mandatory retirement, would many seniors lose their jobs at ages 55-65 whereas they would otherwise have kept them? From this perspective, what impact would a ban on mandatory retirement have on government income support programs?
2. Does mandatory retirement, as it has been argued, eliminate the need for job evaluations for senior workers. If mandatory retirement were eliminated, would job evaluations for senior become a serious problem? Would such evaluations be difficult and costly? Would such evaluations be a source of emotional anxiety and possible abuse? Would they likely lead to numerous and costly legal challenges?
3. To what degree does mandatory retirement permit orderly staff planning from the corporate perspective? Would its elimination introduce substantial organizational uncertainty? What practices would facilitate staff planning if retirement dates were flexible and depended only on the wishes of the senior employee? For example, how much notice should a senior have to give in regard to his or her retirement date decision?
4. Each employment agreement includes many elements. A substantial change in one element may necessitate changes in other elements, and some of the latter may be undesirable. For example, current employment agreements may include job security and even "tenure", pensions at age 65, and a wage profile that increases later in life as a kind of forced saving. These elements may be undesirable in themselves. Would any of these have to be changed if mandatory retirement were eliminated?

5. Does mandatory retirement protect workers as well as the public from accidents that could be caused by the aging process? Is occupational safety best ensured through mandatory retirement? What alternative practices could ensure occupational safety? Should mandatory retirement be retained for some specific occupations where accident risks to the public and fellow workers are particularly high?

6. Does mandatory retirement open up specific positions in the occupational hierarchy, so that younger workers can see an orderly progression through the ranks? The creation of promotion opportunities stimulates and rewards younger workers, and it fosters the application of new ideas as younger workers are accorded positions with greater responsibility. Would the prohibition of mandatory retirement significantly reduce employment and promotion opportunities for young workers? Is this a more severe problem in some occupations than in others? Should some specific occupations retain mandatory retirement for this reason?

7. For the society as a whole, does mandatory retirement reduce total unemployment by creating new job openings — directly and indirectly — for young people entering the labour force? Is the older worker who retires replaced with a younger worker who might otherwise be unemployed? What impact would a ban on mandatory retirement have on the overall unemployment rate? Is this an important consideration?

8. Does mandatory retirement provide a useful and practical mechanism for eliminating legal conflicts over unjust dismissal of seniors? Lawsuits are costly for all concerned; they involve lengthy time delays; and they can cause emotional anxiety. Would the prohibition of mandatory retirement result in large numbers of wrongful dismissal lawsuits? Would the corporate decisions concerning retirement of seniors result in many seniors taking their disagreements to the courts?

9. Mandatory retirement is the outcome of a free negotiation process, in which both employers and employees agree to the specified retirement age. Is the right to negotiate mandatory retirement as past of a contract an important freedom for all concerned, and for the trade union movement in particular?

   If mandatory retirement were eliminated, it is conceivable that individuals could be left to their own negotiating abilities for the ultimate determination of retirement age and related provisions. This could put individuals at a disadvantage. Arguably, the right of collective bargaining is as important for retirement as it is for other terms and conditions of employment.

Should Mandatory Retirement be Prohibited?

Particularly in recent years, concerns have been raised that mandatory retirement is unfair discrimination. Workers may be dismissed automatically, solely on the basis of their age reaching the specified mark. Some individuals feel capable to continue working beyond that somewhat arbitrary mark, and some want the right to do so.

Canada's Charter of Rights and Freedoms has been cited by many in support of the elimination of mandatory retirement. Canada's Charter promises equality and forbids discrimination. Several lawsuits currently before the courts refer to the Charter from this perspective. At this point, judicial interpretations are not yet clear as to the implications of the Charter for mandatory retirement.

Quite apart from the Charter and current lawsuits, some people may feel that the Ontario Government should take the initiative to prohibit mandatory retirement. Some feel that it should limit mandatory retirement to specific occupations where safety is clearly related to age, or where mandatory retirement is closely linked to other terms of employment like tenure and pensions, or where periodic job evaluations are not practicable.

Some critics of mandatory retirement note that the average age of entry to the work force has been rising because of greater educational requirements. At the same time, life expectancy at age 65 has been increasing due to better health and better health care. The appropriateness of 65 as the automatic retirement age may no longer be generally accepted.

Are these developments a justification for raising the retirement age from 65 to, say, 70? Alternatively, are educational requirements, health, and abilities, such an individual matter, that we should have complete flexibility in retirement age, with the retirement decision dependent on each person's individual situation?

Are there certain groups who have particular reasons for prohibiting mandatory retirement? For example, do significant numbers of women want to postpone retirement because of a relatively low lifetime income and relatively small pension payments? Do certain professions such as medical doctors or university professors want to postpone retirement because of their special circumstances?

Implications of Prohibiting Mandatory Retirement

If mandatory retirement is to be prohibited, a number of significant implications may develop. The Task Force will examine these implications and will comment on appropriate public policy concerning them.

Dozens of statutes, regulations and government programs may have to be amended to delete references to mandatory retirement. Automatic qualifications for certain government assistance at specified ages may have to be changed. In each case, what should these requisite changes be?

Even if one were to accept the case for abolishing mandatory retirement, are there nonetheless some specific occupations and some types of retirement agreements that should be exempted? What are the general considerations for establishing such exemptions, and for what jobs and professions in particular might mandatory retirement need to be continued? Differences among occupations could be the basis for different treatment in regard to retirement. Decisions of the courts and the Ontario Human Rights Commission concerning the retirement of senior workers may vary among occupations, depending upon the issues in each particular case. Perhaps the Ontario Human Rights Code itself could be amended, so that the Ontario Human Rights Commission would be required explicitly to treat particular occupations in specific ways.

As noted explicitly in the terms of reference, pension plans and collective agreements could be affected significantly by the elimination of mandatory retirement, as could personnel and human resources planning and practice. For example, the design, cost, and funding of existing pensions plans could all be changed by the prohibition of mandatory retirement. Defined benefit plans would likely be affected more than other types of plans. Recently, the Canada Pension Plan (CPP) has been amended to provide pensions that vary in size, depending upon one's age at retirement. Should the CPP formula become the standard for all defined benefit plans?

Would a prohibition of mandatory retirement harm the attempts of women's representatives to gain better pensions provisions for women?

The Task Force will explore ways of easing and facilitating the transition, if mandatory retirement were to be prohibited. Perhaps new practices can be recommended, such as collective bargaining involvement in determining the framework for individual retirement dates and conditions.

Prohibition of mandatory retirement could imply a shift to more part-time work by seniors. Faced with the new option of not retiring, some seniors may prefer to accept part-time work and a gradual separation from their occupation. Hence the terms and conditions of part-time work are also of concern to the task force.

With many of these questions, the experiences in other jurisdictions may be helpful. Some Canadian provinces and some U.S. states have banned mandatory retirement. The relative seriousness of the many issues may be revealed through an examination f their experiences. similarly, other jurisdictions may have developed new procedures and practices to overcome adverse implications of a mandatory retirement ban.

The Task Force would appreciate receiving any information you may have that casts light upon the issues raised in this summary. Your opinion concerning the relative importance of the issues would also be helpful. Furthermore, it is likely that this brief summary has not included some issues which you believe to be significant, and you could assist us by bringing them to our attention. We would like to thank you very much for contributing in this way to our work–plan and our research process.

Appendix E

Significant Findings from Research and Public Consultation

Note: This Appendix presents in some detail the most significant findings from the research and public consultation conducted by the Task Force. Here the interested reader will find more detailed information about the issues on which conclusions have been reached and recommendations made. Much of this appendix consists of selected excerpts from the research reports commissioned by the Task Force. These selections represent the Task Force's own interpretations of significant evidence. They do not necessarily reflect the views or complete words of the authors of those reports and are not intended to stand as authoritative in themselves. For example, they omit the scholarly apparatus of footnotes and references given in the reports. Any reader wishing to pursue an issue critically beyond the views of the Task Force should therefore go directly to the research reports, which will be available from the Ministry of Labour.

Contents — Appendix E

Part 1

Potential Effects Of Banning Mandatory Retirement On Society, On Workers, And On Employees

Contents

1

Mandatory Retirement and the Canadian Charter of Rights and Freedoms: Current Judicial Interpretations

Mandatory Retirement and the Charter of Rights

This chapter aims at assessing the likely fate of laws and policies prescribing or authorizing mandatory retirement, in operation in Ontario, when examined by the courts in light of the equality provision of the Canadian Charter of Rights and Freedoms. The views expressed here are necessarily tentative since the Supreme Court of Canada, which will ultimately determine the effect of the guarantee of equality rights in Section 15 of the Charter, has yet to consider that section in any of the Charter cases it has decided. This is not unexpected as the equality provision was a late bloomer, becoming effective on April 17, 1985, three years to the day after the rest of the Charter came into force. Since that date a number of provincial and federal trial and appellate courts have developed some distinctive approaches to the application of the assurance of equality and non-discrimination afforded by the Charter. Superior court judges in Ontario and British Columbia have dealt specifically with the impact of the Charter's prohibition of age discrimination on certain mandatory retirement practices.

Section 15 of the Charter provides as follows:

> (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.
>
> (2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age, or mental or physical disability.

For further reference: Colin H.H. McNairn, *Mandatory Retirement and the Charter of Rights,* a report commissioned by the Task Force.

This section must be read with Section 1 of the Charter, which is in the following terms:

> The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

The Supreme Court of Canada has had occasion to interpret this provision and in so doing has given some general guidance as to what limitations on a Charter right will be permissible.

It will be helpful in considering the potential effect of the Charter on mandatory retirement to make a preliminary distinction between the public and private employment context in which it may arise.

Public Sector Employment

The actors directly subject to the constraints of the Charter are defined by Section 32 as follows:

> (1) This Charter applies
>
> (a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories, and
>
> (b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.

One of the affected actors is, therefore, the legislature. Consequently, any enactment of the Ontario Legislature that requires retirement at a fixed age will be exposed to potential Charter challenge on the basis that it involves discrimination because of age.

The Constitution of Canada, of which the Charter is a part, provides in Section 52(1) that "any law" inconsistent with the provisions of the Constitution (including the Charter) is to the extent of the inconsistency of no force and effect. The expression "any law" certainly includes statute law, the product of legislative activity.

It follows that any Ontario statutory provision that requires retirement from a public sector position at a fixed age can be subject to judicial assessment in light of the prohibition on age

- Section 15 does not simply direct that equality should be inherent in a law but that there should be equality "before the law", that is in the administration of the law;

- the statutory provision that authorizes a public body to hire and fire employees is a "law" for the purposes of Section 15;

- any decision to terminate an employee on the basis of age involves the administration of that law and, therefore, may be tested against Section 15 of the Charter;

- if the law fails to meet that test it will be ineffective, notwithstanding its broad terms, to authorize age–based terminations, because of Section 52(1) of the Constitution;

- in any event there can be consequences of a violation of the Charter other than those provided for in Section 52(1) of the Constitution since Section 24 of the Charter permits anyone whose rights as guaranteed by the Charter have been infringed to apply to a court of competent jurisdiction to obtain any remedy that "the court considers appropriate and just in the circumstances", which might be an award of damages for wrongful dismissal.

The position taken by the majority in the *Essex Board* case, by comparison, would permit the easy avoidance of the requirements of the Charter simply by turning discriminatory rules that are statutory into practices.

If it is accepted that the Charter potentially affects age–based termination practices of public sector employers in this way, the courts will have to address the question of whether mandatory retirement pursuant to a policy rather than a law can survive Charter scrutiny. The fact that it is a policy that is directly in issue will likely make it impossible for a justification for an age–related termination to be offered under Section 1 of the Charter. That section permits reasonable limits on Charter rights that are "prescribed by law". The general statutory power given to a public employer to retain and dismiss employees cannot be relied on as a legal prescription to discriminate on the basis of age for it is too imprecise for that purpose. The reason for requiring that a limit on a Charter right be prescribed by law is to ensure that the limit "has been established democratically through the legislative process or judicially through the operation of precedent over the years". A broad statutory discretion to hire and fire would not appear to meet that objective. As will be seen below, if Section 1 cannot be relied on as a justification for mandatory retirement in a particular context (such as that illustrated above), there is a very real likelihood that it will be found to violate the prohibition on age discrimination in Section 15 of the Charter in that situation.

While we have indicated that the Charter applies to public employers and have given, as examples, the provincial government and school boards, we have not attempted to define precisely what is meant by public employers to which the Charter may apply. We suggest that it will include Crown agents as well as the bodies to which reference has already been made. Crown agents are entities that are closely controlled in a financial and operational sense by the government or legislature under the terms of their governing legislation. There is an established jurisprudence indicating the particular factors that are relevant in determining whether an entity has that status and is, therefore, entitled to enjoy the special privileges and immunities of the Crown. The courts are apt to apply this recognized body of law in order to determine if an entity is part of "government" in the sense of Section 32 of the Charter.

Another category of governmental actor for Charter purposes is likely to comprise municipalities and other local boards and commissions that are closely controlled by the government under the terms of the Municipal Affairs Act and other provincial enactments.

Some courts have suggested that the question of whether an entity is part of "government", as that term is used in Section 32 of the Charter, may depend on the nature of the function it performs, that is whether it is within the traditional province of government. This is likely to prove an unmanageable test with little predictive value, as has been the case when the test has been used as a guide to determine whether a particular entity is a Crown agent. A functional analysis is not, therefore, likely to receive widespread judicial acceptance.

discrimination in Section 15 of the Charter. If such a provision were found to violate that section and could not be supported, pursuant to Section 1 of the Charter, as a "reasonable limit" on an equality right, it would inevitably be without force or effect.

A catalogue of the Ontario statutory provisions requiring termination of service in a public office or employment at a fixed age is included elsewhere in this appendix. The particular statutory direction of mandatory retirement capable of affecting the largest number of individuals is contained in Section 17 of the Public Service Act. That section requires all civil servants to retire on attaining the age of 65, subject only to discretionary extensions in special circumstances, from year to year, to age 70.

In order to avoid any question being raised about the constitutional validity of this section of the Public Service Act, the Legislature might, of course, repeal the provision. But if the Ontario government nonetheless continued to retire civil servants at 65, relying on the prerogative power to terminate its employees at any time (on the theory that Crown servants hold office at pleasure) its retirement practice would not escape the potential reach of the Charter. This is because the government, as well as the legislature, is an actor to which the Charter applies, by virtue of Section 32 of that constitutional document. The "government" for these purposes means the executive or administrative branch of government. In retiring a civil servant at 65, in exercise of a Crown prerogative, the Ontario government would be acting in an executive capacity. The prerogative is part of the common or unwritten law and as such qualifies as a "law" for the purposes of Section 52(1) of the Constitution of Canada. Consequently, the prerogative will not be effective as authority for the government terminating an employee at 65 if such action were to violate the prohibition on age discrimination in the Charter. In short, even if the government can rely on prerogative rather than statutory authority for a particular course of action, it will not thereby escape the rigours of the Charter.

Let us assume, however, that a public employer other than the provincial government — such as a school board — adopts a practice of forcing its employees to retire at 65. The Charter will likely apply to a school board because of the degree of control the province exercises over its general activities. In other words, the board can be taken to be a "government" actor to which Section 32 extends the reach of the Charter. In terminating an employee at 65, such an employer would not be acting pursuant to a specific statutory directive nor could it rely on any Crown prerogative. This particular employment practice is likely to be the result of something no more formal than a written policy. That policy may or may not be reflected in the terms of a collective agreement or individual employment contracts covering the affected employees.

In this situation, is there a "law" that the school board's retirement policy can be said to have implemented, to which a court could apply

- the equality guarantee of Section 15 of the Charter and, if it fails to measure up,
- the consequence of invalidity under Section 52(1) of the Constitution?

In a recent decision involving the Essex County Separate School Board a three member Ontario Divisional Court bench split on this issue. Two members of the court held that no "law", in the relevant sense, was involved in the Essex Board's retirement–at–65 policy and that the Charter was not intended to affect private matters such as employment relationships even if the employer was a public body subject to the Charter. The third judge thought that the policy was a "law", which could be tested against the Charter, although he then concluded that the policy did not violate the Charter. In the result, he was able to concur in the decision of the majority to dismiss a teacher's complaint, based exclusively on the Charter, that he was wrongfully terminated simply because he had reached age 65.

We believe this issue ultimately will be resolved at the appellate level in favour of the view that the termination by a public sector employer of an employee on the grounds of age *is* subject to judicial review in light of the Charter. The preferred line of reasoning, in support of this position, is as follows:

To date the courts have held the following bodies to be, in effect, "government" for the purposes of Section 32 of the Charter:

(a) an Ontario school board,

(b) an Ontario community college,

(c) a public hospital in British Columbia, and

(d) municipalities in Ontario and British Columbia.

Universities in Ontario and British Columbia have been held not to constitute "government" in the sense of the Charter. In our opinion this conclusion will likely be sustained by the appellate courts given the traditional autonomy of universities.

In summary, the Charter applies to mandatory retirement in "public sector employment", an expression that for present purposes includes, at a minimum, the provincial government, provincial Crown agents, municipalities and local boards and commissions. If mandatory retirement in the public sector is the manifestation of a practice or policy but not of a statute or the common law, it is unlikely that it can be justified in reliance on Section 1 of the Charter should it be found to offend Section 15 of the Charter.

Private Sector Employment

The Supreme Court of Canada has recently held, in the *Dolphin Delivery* case, that Section 32 of the Charter provides an exhaustive statement of the actors against which the constraints of the Charter apply. The Charter does not, therefore, apply to private employers who might practice mandatory retirement. However, it may affect that private sector practice indirectly through its impact on the legislature and provincial legislation.

The Ontario Human Rights Code, which applies in both the private and public sectors, prohibits discrimination in employment on the basis of age; but "age" is defined, in Section 9(a), as "an age that is eighteen years of age or more and less than sixty-five years". Thus mandatory retirement at 65 or some later age is not prohibited in Ontario. Those who are within that age range could argue that under Section 15 of the Charter, they are entitled to the "equal protection and equal benefit of the law" with those who are between 17 and 65 years of age. For those 65 and over, therefore, age discrimination, and therefore mandatory retirement, should be prohibited as it is for those in the broader age group. A court cannot, of course, make a positive amendment to a statute such as the Code — that is for the Legislature — but it can hold a severable portion thereof to be of no force and effect if it offends the Charter.

In the *Justine Blainey* case the Ontario Court of Appeal, in a two to one decision, recognized that limitations in the Human Rights Code on the protection that the Code affords can themselves run afoul of Section 15 of the Charter and, therefore, be held invalid leaving a general prohibition of the Code to operate in an unqualified manner. In the *Dolphin Delivery* case the Supreme Court of Canada referred to the *Blainey* decision as, "an illustration of the manner in which Charter rights of private individuals may be enforced and protected by the courts, that is, by measuring legislation — governmental action — against the Charter".

In the *McKinney* case, which called into question the Ontario universities retirement-at-65 policy, Mr. Justice Gray appears to have accepted the *Blainey* approach as appropriate in relation to Section 9(a) of the Human Rights Code. He would apparently have been prepared to hold that section invalid as a severable part of the Code had he concluded that mandatory retirement at 65 offended the Charter.

It is by no means clear, however, that it would be proper for a court to sever Section 9(a) of the Human Rights code if it found that mandatory retirement infringed Charter rights, for that section,

- saves all age-based employment discrimination — not just mandatory retirement — from review under the Code if the affected employee is 65 or over;
- does not mandate or direct retirement at 65 but simply evidences legislative neutrality about the practice; and
- may be so integral to the scheme of the Code that it should not be excised by a court, applying the proper tests for

severability in a constitutional or Charter case.

The fact that "age" is confined by a separate provision in the Code that stands apart from the prohibition of age discrimination in employment is, in a sense, an accident of drafting. The relevant Code provisions might have been integrated and worded as follows:

> No employer shall discriminate against an employee on the basis that he or she is of an age between 17 and 65.

If the Code were so framed there would be no part that could be sensibly severed if mandatory retirement were found to violate the Charter. To remove the words "between 17 and 65" would be to leave a prohibition that did not make grammatical sense. A court is entitled to delete a portion of a statute but it cannot add thereto to make sense of what is left or otherwise repair the offensive provisions. That is a task for the legislature.

In summary, mandatory retirement in the private sector is not subject to the Charter although it may be prohibited by the Human Rights Code even if it occurs at age 65 or more, should Section 9(a) of the Code be found to offend the Charter and to be severable from the rest of the Code. If that were to happen, the resulting prohibition of age discrimination in the Code, now without an age cap, would affect both the public and private sectors since the Code applies indifferently in each domain. The Code's prohibition of age discrimination could only be avoided in mandatory retirement situations if other legislation explicitly authorized that practice in the relevant circumstances notwithstanding the Code.

If mandatory retirement at 65 offends the Charter, however, it does not necessarily follow that Section 9(a) of the Code will be of no further effect. That depends on whether it is proper for a court to sever it from the rest of the statute, a matter on which there is considerable doubt at this time for the reasons indicated above.

We now turn to a consideration of the question of whether mandatory retirement is inconsistent with the protection of individual rights in the Charter. That will involve a review of the scope of the prohibition of age discrimination in Section 15 of the Charter and of the reasonable limits on Charter rights permitted by Section 1 of the Charter. Both sections may be relevant for if mandatory retirement offends Section 15 that will not be the end of the inquiry since it may be saved by Section 1.

The Scope of Section 15 of the Charter

There are several ways of testing a law (or governmental action) against the dictates of Section 15 of the Charter. The following questions might be asked:

1. Does the law treat those who are similarly situated in a similar fashion having regard to the purpose of the law?

2. Is the law reasonable or fair having regard to its purpose or effect?

Positive answers to these questions would suggest that the law would satisfy Section 15 and negative answers that it would not. There is a good deal of judicial support for each test. Indeed, the Ontario Court of Appeal appears to have taken the view in a recent case that affirmative answers must be given to both questions before a law can be taken to have cleared the hurdle of Section 15.

Of the three judges — all at the provincial Supreme Court level — who have measured mandatory retirement against Section 15, two have found it wanting on the basis of a negative answer to the first question and one has found it sustainable on the basis of a positive answer to the second question. Even in this small sampling of judicial opinion there is obviously no clear pattern either in the approach to Section 15 or in the outcome of the analysis.

To complicate matters even further, mandatory retirement might be assessed against Section 15 in another way. As it involves a distinction with significant consequences for the individual on the basis solely of age, an enumerated ground of discrimination in Section 15, it can be argued that that is enough to bring it within the scope of Section 15. Since age and certain other personal characteristics have been singled out, within the generality of Section 15, distinctions on these bases might be viewed as *prima facie*

objectionable, thereby throwing the burden of justification (under Section 1) on the proponent of the distinction.

The logic of this interpretation of the intent of Section 15 is reinforced by the manner in which human rights codes have been construed. That legislation has traditionally contained prohibitions of discrimination on specific grounds, which discrimination is described in terms similar to Section 15 of the Charter except that the grounds may be different and the list thereof exhaustive, unlike that in Section 15. Under the codes, no inherent limitations have been found in the concept of discrimination on a prohibited ground, such as a requirement that the conduct complained of be unfair or unreasonable. Since mandatory retirement is treated as constituting age discrimination for the purposes of human rights codes (subject only to the specific exceptions of the relevant code), it would seem that it should also constitute age discrimination for the purposes of Section 15 of the Charter.

In our opinion, the latter analysis is likely to be ultimately accepted by the Canadian courts, in which case mandatory retirement will be found to violate Section 15 leaving it to be justified, if at all, by reference to Section 1 of the Charter.

In any event, even if either or both of the two questions set out above are accepted as the only test for measuring mandatory retirement against Section 15 of the Charter, that general practice may well be held to evidence inequality or discrimination in the sense evident in the test being applied. In conclusion, therefore, there is a strong likelihood that the Supreme Court of Canada will find in due course that mandatory retirement offends Section 15, leaving it to run the gauntlet of Section 1.

The Scope of Section 1 the Charter

If Section 1 of the Charter comes into play the onus will rest on the person seeking to uphold a limit on a Charter right under that Section to convince a court of the justification for the limit. The standard of proof will be that imposed in a civil case, that is, proof on a balance of probabilities. In the Supreme Court's view only a very high degree of probability that a Charter limit is justified will shift the balance in favour of the proponent of that limit. The evidence will have to be cogent and persuasive to tip the scale.

For a limit on a Charter right to qualify under Section 1 it must be "prescribed by law". As indicated earlier a mandatory retirement practice that is derived from a policy rather than a statute or some common law principle cannot be said to be prescribed by law and, therefore, to be justifiable in terms of Section 1 of the Charter. If the practice has been agreed to under the terms of an employment contract or a collective agreement that too will fall short of a prescription by law in the relevant sense.

Assuming, however, that there is a true "law" at issue, the Charter limitation will have to satisfy the so–called *Oakes* criteria established by the Supreme Court of Canada in a case of that name. Those criteria in their potential application to mandatory retirement and the Charter's guarantee against age discrimination may be stated as follows:

1. The objective of mandatory retirement must be of sufficient importance (at a minimum it should relate to "pressing and substantial" concerns) to warrant overriding the individual's freedom from discrimination on the basis of age;

2. Mandatory retirement must be a reasonable means of meeting the underlying objective of that practice in the sense that,

   (a) it is carefully designed to achieve the objective and is not arbitrary, unfair or based on irrational considerations,

   (b) it must impair freedom from discrimination on the basis of age as little as possible, and

   (c) the effects of mandatory retirement must be proportional to the objective.

The "objective" that is referred to is presumably not, or at least not exclusively, the objective intended by the legislators as evidenced by the debate on the relevant law, assuming it to be a statute, but is rather what a court might take to be the objective.

Because of the importance of the evidence called for by the *Oakes* criteria to the result of a particular case, it is difficult to predict how the Supreme Court will come out when it performs

the balancing exercise dictated by these criteria. In the *Mckinney* case, in which mandatory retirement at 65 was held to meet the requirements of Section 1, Mr. Justice Gray was particularly concerned that any other conclusion would undermine the integrity of pension systems and the employment prospects for younger members of the labour force. On the appeal from this decision, which has been heard but not yet disposed of, serious questions have been raised as to whether these concerns can be taken to be sufficiently "pressing and substantial" to satisfy the *Oakes* test. Even if they are, the appellants have questioned whether, by allowing mandatory retirement at 65, the Legislature has not overshot the mark in that the encroachment on freedom from age discrimination is not carefully limited to addressing those concerns. If maintaining the integrity of pension plans is a central objective, for example, could that freedom not be maintained at least in relation to employees that do not have the benefit of pension plans by protecting them from mandatory retirement?

It is doubtful that the existence of a collective agreement providing for mandatory retirement at 65 will assist in making a case for the application of Section 1. In interpreting human rights code prohibitions on age discrimination, as applied to mandatory retirement, the courts have made it clear that an affected individual (or, more accurately, his or her union) will not be allowed to contract out of the protections of the basic rights set out in the code. It is likely that the courts will adopt a similar approach to the fundamental values of Section 15 of the Charter since the relevant considerations would seem to be no different.

The broader the scope for mandatory retirement authorized by law the more difficult it will be to satisfy the very stringent test of Section 1. In general terms, that test requires that a limit on a Charter right be finely tuned, going no further than is reasonably necessary to meet a compelling objective. Therefore, it will often be harder to justify a rule of mandatory retirement that affects a wide range of diverse occupations, such as that established by Section 71 of the Public Service Act for all civil servants, than a rule that relates to a particular type or types of employment. In the latter case, there may be circumstances that make the individual assessment of the capabilities of older employees impractical or otherwise unacceptable, that would not pertain in other classes of employment. To allow mandatory retirement of those in the relevant category, therefore, may be said to be reasonably necessary to meet the objective of the particular rule although that might not be the case if the rule were more broadly based.

The exception from the current prohibition on age discrimination in employment in the Ontario Human Rights Code that allows for mandatory retirement if age is a *bona fide* occupational qualification for a job would be likely to meet the requirements of Section 1 of the Charter, should they be held to apply. This is a reasonably safe conclusion because that exception has been narrowly construed by the courts, leaving it applicable primarily to jobs such as that of police officer, firefighter, bus driver and airline pilot where the risk to the public from any deterioration of physical condition and reaction time that accompanies the aging process may be drastic.

Later in this report we consider the possibility of other exceptions to a prohibition on mandatory retirement, some of which would be permanent and some temporary. Of the possible permanent exceptions, that for participants in pension plans (as under the New Brunswick Human Rights Act), may be difficult to justify notwithstanding that it could be said to be carefully confined to meeting the objective of maintaining the integrity of pension plans. Assuming mandatory retirement at age 65 as a general rule were found to violate the Charter, the obstacles to sustaining a case for a pension plan exception to a ban on mandatory retirement include:

- the very broad practical impact of such an exception in that mandatory retirement is particularly prevalent where there is a pension plan;
- the fact that the existence of a pension plan is no guarantee of an adequate retirement income at 65;
- the fact that many pension experts maintain that pension plans could easily accommodate the absence of mandatory retirement.

A particular limit on a Charter right might be time–related, such as a transitional rule designed

to provide a period of adjustment or accommodation in anticipation of a new rule that is less restrictive of the Charter right and would come into effect automatically at the end of the period. That kind of a limit which, by its terms, phases out after a short period might prove to be acceptable under Section 1 of the Charter, notwithstanding the short term effect on a Charter right. For example, even if mandatory retirement were held to violate the Charter, a law allowing the mandatory retirement of university professors at, say 65, might be justified if it were subject to a sunset clause that came into effect after a reasonably limited transition period. Consideration be given to invoking Section 33 of the Charter to avoid the possibility of any constitutional challenge to such a transitional exception, whether for university professors or for individuals covered by an existing collective agreement providing for mandatory retirement.

In conclusion, mandatory retirement will have to undergo a heavy burden of justification to satisfy Section 1. If that employment practice is the result of a policy rather than a law, it will not, by definition, have the benefit of Section 1. If it is the result of a law, the broader the circumstances in which mandatory retirement may take place under that law, the more difficult it will be to sustain the law for Section 1 requires that it be carefully confined so as to impose the least restriction on freedom from age discrimination. Accordingly, the qualifications or exceptions in relation to any ban on mandatory retirement may themselves have to pass muster under Section 1 of the Charter.

2

Human Rights: The Interests and Rights of Individuals vs the Interests and Rights of Groups and Society

Introduction

A human right is a claim for some specified kind of treatment to be accorded to specified persons or groups of persons. We thus delimit rights to include only claims that other people as individuals or organized in collectivities are capable of fulfilling. Thus we might speak of the "right" of a child stricken with a fatal illness to a longer life, but on the assumption he or she had not been denied the best medical attention available, we would be using "right" in a metaphorical sense. To put it another way, human rights by definition involve human obligations and there is a legal aphorism to the effect that where there is a right there is an effective remedy. Although no serious student of rights maintains that they are confined to claims against or enforced by the state, the constantly expanded role of public authorities in defining, ranking and implementing rights is a prominent feature of life in liberal democracies.

When we speak about rights, we need to determine whether the indicative or imperative moods are being used. Although the American Declaration of Independence refers to human beings having the right to "life, liberty and the pursuit of happiness", persons do not demonstrably have these as they have eyes and legs and livers. The assertion here is of a moral imperative, that certain claims *should* be recognized. A contemporary Canadian black person speaking of his or her right to vote in elections is describing the situation as it exists; a black South African contemporary is asserting a moral claim denied by the law and public authorities of that country. The distinction between positive law and standards not created by such law but by which positive law is to be judged, is at the heart of Western political tradition, although profound differences exist about the source and nature of such standards.

For further reference: Donald V. Smiley, *Mandatory Retirement and Human rights,* a report commissioned by the Task Force.

There is an enormous amount of analysis of human rights among contemporary theorists of law and politics. Each of these groupings contains persons who differ significantly, dividing rights theorists into the rights–as–trumps school and the consequentialists.

Ronald Dworkin is one of the most influential of the rights–as–trumps philosophers. His definition: "A right is a claim that it would be wrong for the government to deny an individual even though it would be in the general interest to do so." In Dworkin's uncompromising view, rights are claims which can appropriately and effectively be asserted against the state and public interest. Robert Nozick and John Rawls can also be classified as rights–as–trumps philosophers, though there are important differences among them.

Consequentialism asserts that rights must be justified in terms of their results for the individuals and groups claiming them, *and* for the wider society. The various brands of utilitarianism, which assert that the ultimate standard is the greatest good or the greatest happiness of the greatest number, are the most influential of consequentialist thinking. One consequentialist describes this general kind of analysis:

> Sound moral reasoning is a comparative process. First, we must identify the alternative courses of action and determine what the likely consequences of each will be. Second, we must evaluate each of these sets of consequences both positively and negatively on the basis of some appropriate evaluation criterion. Then, finally, we must compare the sets of consequences to determine which of them will produce the highest level of the appropriate criterion when both positive and negative consequences have been taken into account. The action that produces the best set of consequences of all those available is the action that, according to the consequentialist approach, should be undertaken.

The rights–as–trumps theories respond to the barbarities of our generation. One political philosopher wrote:

> Naziism and later the Vietnam War played a major role in bringing about a sea change in

> ethical theory. The horror of human torture and genocide brought home the realization that it was impossible to do justice to our moral intuitions by any utilitarian or other consequentialist line of reasoning. Certain things are wrong, period."

Most of the rights–as–trumps school of theorists are American and their formulation dovetails nicely with a pervasive American school of thought asserting that the only purpose of government is to protect individual rights. A plausible case can be made that this kind of anti–state individualism is not congruent with the dominant tradition of Canadian political culture and two recent critics of the Charter of Rights and Freedoms have written this:

> The Charter shifts Canada towards a much more individualistic focus: not only will much of the Charter decision–making revolve around individual versus group interests, but it will also look to the United States for guidance in the resolution of these disputes. The United States has had over two hundred years of an individualist focussed Lockean liberal tradition. The Charter of Rights and Freedoms will bring an essentially counter–revolutionary, non–rationalist, communitarian society into direct collision with individual focussed legal rights based on Charter arguments ... we have followed the path of John Locke rather than Edmund Burke.

Unless we define rights in a highly abstract way, there are actual or conceivable circumstances in which it would be deemed by most persons appropriate to override rights. To take an extreme example, the rights of persons not to be tortured by the state authorities is under all but the most urgent of circumstances to be defended; but if imminent nuclear terrorism could not be avoided in any other way, even this right might legitimately be overridden. Section 1 of the Charter of Rights and Freedoms recognizes the contingent nature of rights by enacting that:

> The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

The "reasonable limits" clause does not negate the rights enunciated by the Charter. Once it has been determined, by the courts in the last instance and subject to the override powers of Section 33, that a Charter right has been abridged or denied, the onus is on governmental authorities to justify such action rather than on the individuals or groups claiming the rights to defend *their* position. Rights can be abridged only "by law", not by entrenched custom, administrative orders or the transient will of officials of the state.

As we shall see below, the distinguishing characteristics of the rights revolution is that those making human rights claims on the community are attempting to restrict the range of consequences under which such claims may legitimately be limited or denied.

There has been a good deal of discussion about the ranking of rights. Henry Shue has argued that physical security, subsistence and the capacity to participate in the decisions and social institutions which most directly affect the individual are "basic rights" defined as "everyone's minimum reasonable demands on the rest of humanity". Shue's influential book is focussed on norms for United States foreign policy and has limited relevance to the Canadian situation in which his basic rights are for the most part secured. One might rank the following rights as more fundamental than others:

- First, the rights of persons to effective participation in the democratic political process. This would include the "Democratic Rights" of Sections 3 and 4 of the Charter along with such elements of Section 2 related to the freedoms of belief, expression and association as these relate to the political process.
- Secondly, the rights of persons that actions of the state conform to the broad procedures of due process and natural justice. Some of the most important safeguards here are embodied under Sections 7 – 14 of the Charter "Legal Rights".

It must be emphasized that this ranking of rights is personal and does not conform with the Constitution Act, 1982. According to the Charter, there are three classes of rights, ranking from the most basic to the least basic in terms of how such rights may be modified:

(a) The provisions of the Charter related to language rights, except those entrenched in particular provinces, are amendable only with the consent of Parliament and all the provinces.

(b) The provisions relating to "Democratic Rights" (Sections 3 and 4), Mobility Rights (Section 6), the equality of males and females and, perhaps, Section 29 relating to the educational rights of denominational

minorities are amendable with the consent of two–thirds of the provinces having in aggregate at least half the population of all the provinces but are not subject to the legislative override of Section 33.

(c) The provisions related to the fundamental freedoms (Section 2 related to conscience, religion, freedom of association and expression) legal rights (rights of persons charged with or convicted of crimes) and equality rights (Section 15) may be amended by Parliament and two–thirds of the provinces having in aggregate half the population and are subject to be overridden by Parliament or the legislature of a province under the provisions of Section 33.

The Rights Revolution

In Canada as in other western societies a steadily increasing number of claims are being advanced as human rights. Some of these are claimed for or on behalf of groups: as a decade ago we heard a great deal about the right of Quebec to self–determination, now there is discussion of the right of Canadian aboriginals to self–government. From contradictory premises we hear of the "right to life" and the "right of women to control their bodies". There are now the "right" of persons to an uncontaminated natural environment and the "rights" involved in freedom of information and personal privacy. Some philosophers now write about "animal rights", while the humane societies in Ontario and elsewhere deal with the struggle between animal rights activists and more conservative elements. The Canadian Charter of Rights and Freedoms of 1982 is both a reflection of the rights revolution and an important influence towards the demands of individuals or groups to be pressed as rights.

There would appear to be three consequences of the rights revolution for political conflict in liberal democratic societies:

First, the general thrust of articulating demands as rights makes political and social conflicts less susceptible to resolutions which are at least minimally acceptable to those involved in such conflicts. Supporters of particular rights might admit as an abstract proposition that no rights are absolute; in an ultimate sense they might be consequentialists as this term was defined above. What they are trying to do is narrow the range of consequences under which such a right could legitimately be denied or abridged, to enhance the priority of such a right as against other claims.

Rights then are trumps. The result is that to the extent social conflicts are articulated in terms of rights, such conflicts are difficult to resolve. The Canadian political philosopher Tom Pocklington put it this way:

> Those who advance political claims under the aegis of human rights, believing that their causes are sanctified by the most powerful of all moral considerations, are in no frame of mind to negotiate ... confronted by such massively heavy artillery, opponents of causes who invoke human rights are virtually compelled to resort to unduly heavy artillery themselves ... the human rights perspective tends to extend political controversies beyond their plausible limits and thereby inhibits reasonable political debate.

To take a current example, if opponents of the alleged inalienable right of aboriginals to self–government were to articulate such opposition on liberal grounds, they might advance the principle that political rights should never be based on ethnicity. Obviously a conflict conducted along such principled lines is almost impossible to resolve by compromise.

Secondly, the thrust of the rights revolution is to define claims as being *against* the community and the person as a rights–bearer rather than as a citizen. Dworkin has put it this way:

> The concept of rights, and particularly the concept of rights against the government, has its most natural use when a political society is divided, and appeals to co–operation or a common goal are pointless.

Dworkin's view has little place for individuals pressing their common goals through government or for evaluating political systems in any other terms than of their effectiveness in protecting individual rights, most crucially rights against government. The disposition of political conflict in these terms is for minorities to press their claim as not being members of the community. Thus in the 1960s and 1970s the assertion of the rights of Quebec to national self– determination was pressed against Canada but it neglected the circumstances that *Quebecois* were themselves Canadians, and by majority vote asserted this identification in the referendum of May 1980.

Similarly, the current debate about aboriginal self-government down plays the Canadianness of aboriginals.

A related difficulty in the rights revolution is the contradiction between the individual defined as a rights-holder and his or her definition as citizen. Alan Cairns has been perceptive in analyzing how the modern state fragments our political identities:

> We approach the state through a multiplicity of classification systems ... which define us by gender, age, ethnicity, region, producer or consumer status, and whether we are French-speaking or English-speaking. Some of our traits are privileged; others are ignored. We approach the state as fragmented selves, calculating the advantages of stressing our ethnicity, our age, our region, our language, our sexual preferences, our doctorates or our disabilities .... We act as managers of our shifting selves in the same way that business adjusts to changes in the laws and regulations .... The flexible multiple identities fostered by our interactions with the state work against our civic sense of wholeness.

We are thus increasingly defined as holders or would-be holders of various kinds of rights. But against whom are such rights asserted? The easy answer is that they are asserted against the state. However, in our kind of society, governments and their constituent agencies characteristically act on behalf of or in response to extra-governmental interests. Thus in acceding to the demand of some group for its alleged rights — and imposing burdens of some kind on other members of society as a result — the state authorities will usually need the support or at least the acquiescence of non-governmental actors. Yet the very circumstances of the rights-society make this support difficult to secure. In some cases, the asserted right may be challenged by other rights, existing or demanded. In other circumstances, the rights asserters will appeal to other persons in the latter's broader citizenship capacities. The rights society, however, de-emphasizes this citizenship role and its dominant focus on self-regarding motives and behaviour downplays the capacity of persons to be influenced by disinterested views of justice and the public interest. In short, an ethic of rights is not paralleled by an ethic of obligation.

Third, there is a disposition in the rights-society for groups to have what they regard as their rights entrenched in the constitution. In some cases this may be the response of a group to safeguard the benefits which they have won against future actions to limit or abridge these benefits. In the recent Canadian context this impulse towards constitutional entrenchment is in considerable part the result of an exaggeration of the extent to which rights can be effectively protected by entrenchment, with a corollary exaggeration of the extent to which courts can or will protect such rights and an unduly pessimistic view of legislative action in such protection.

There is thus in modern society a proliferation of claims advanced in the name of rights and ongoing and rapid changes in how rights should be ranked when they conflict. Should persons have some rights of access to their grandchildren in the event of marriage breakdowns? Should an adult who was conceived through artificial insemination have the right to information about his or her male parent? In the name of equality before and under the law and equality between the sexes should professional women have the right to deduct the wages of nannies from taxable income beyond the normal child-care deductions? There is the naive view about that a right is a right and that any liberal and disinterested person will be able to discern a right and when it is abridged or denied. This is not so.

It would take a detailed investigation to give an account of the new rights that are being recognized in Canada and changes in the way rights are being ranked. These general judgments can, however, be made:

- the rights of property as property have traditionally been understood to have been circumscribed at the same time as new forms of property have been defined and given greater or lesser protection. Thus, the freedom of action of individuals or groups who own businesses or real property has been limited by a host of actions taken by the public authorities. At the same time, new property rights are being recognized such as those related to employment and to spouses' sharing in assets when marriages break down;
- the Constitution and laws enacted under its authority go further than in the past in the explicit recognition of culture, ethnicity and language. Such recognition is embodied in several Sections of the Constitution Act,

1982 – Sections 16 – 24 (official languages), Sections 25, 35 and 37 (aboriginal rights), Section 27 (multiculturalism). In the most general terms, there has been a marked change away from a quasi–official definition of Canada as a British nation with a French–speaking minority to a definition of the country in terms of two official languages, no official culture and with recognition of the unique position of aboriginals;

- the Constitution and legislative enactments have expanded the prohibited grounds according to which persons can be discriminated against while giving explicit recognition to public policies for bettering the position of disadvantaged groups. In an article published in 1985 Thomas Flanagan asserted that there were "30 prohibited grounds of discrimination in Canadian jurisdictions taken together."

Flanagan pointed out that the chief objective of the earlier human rights codes in the provinces was to prohibit discrimination on an ethnic basis and that "the few prohibited criteria of discrimination were easy to comprehend and were stated in familiar terms such as 'race, creed, colour, nationality, ancestry or place of origin'." There has been an expansion of such grounds, however, to include such matters as age, sexual orientation, the possession of a criminal record, etc. The Canadian Charter of Rights and Freedoms contains such prohibited grounds — "race, national or ethnic origin, colour, religion, sex, age or mental or physical disability." However, Section 15(2) goes on to provide that such prohibited discrimination, "does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or physical or mental disability."

Mandatory Retirement and Human Rights

Mandatory retirement relates to provisions of laws, business practices or collective agreements which require persons to give up the benefits of regular employment when they have attained a defined age without any demonstration that particular individuals have become unable to carry out the duties and responsibilities of employment effectively. It has recently been argued that mandatory retirement contravenes human rights, and Section 15 of the Charter of Rights and Freedoms prohibits discrimination based on age so far as federal and provincial laws are concerned, to "the Parliament and Government of Canada" and to "the legislatures and government of each province".

The claim that mandatory retirement violates a human right is a relatively new one in Canada. Two amendments to the British North America Act in the 1960s provided for mandatory retirement — in 1960, enacting that all judges of the Superior Courts of the provinces should retire at 75, and in 1965, that all members of the Senate hitherto appointed should retire at the same age. There was no claim at the time that such provisions violated human rights. Federal legislation enacted in 1927 and still in effect provides that justices of the Supreme Court of Canada must retire at 75. Thus, interestingly, the judges who give interpretation to the meaning of mandatory retirement in federal and provincial laws, including whether such provisions are enjoined by Section 15 of the Charter, are themselves subject to a regime of mandatory retirement.

As Samuel LaSelva in a recent article points out, the general case against mandatory retirement as the denial of a human right is based on a concept of individual justice. According to this concept, an individual is entitled to retain a job so long as he or she is able to perform the required duties effectively. Aging will decrease such capacities in the long run, but when that happens, employment will end because of the person's incompetence, not age. Thus, mandatory retirement without any assessment of individual competence is unjust, a denial of a human right, even though the age at which it is required represents the point at which most employees become incapable of effective job performance. In a constitutional sense, those who support this general view point to the Fourteenth Amendment of the American Constitution providing for the "equal protection of the law" and the guarantees of Section 15 of the Constitution Act, 1982 providing that every individual is "equal before and under the law and has the right to the equal protection and

equal benefit of the law" without discrimination on the basis of age.

Although, as we have seen, we are in the midst of a rights revolution, we might step back for a moment to explain why a particular right has come to be claimed in the mandatory retirement controversy. There would appear to be a conjuncture of three emergent circumstances:

First, it is possible that age is becoming and will become a more important axis of political cleavage. One scholar has stated, "In 1982 there were more than forty Ontario government programs which incorporated age related eligibility criteria." Even policies not explicitly related to age have a different incidence on particular age groupings, for example, policies related to day–care, the provision of chronic–care hospitals, the $500,000 capital gains exemption in the federal income tax, etc. Age–related cleavages have played a surprisingly small part in the politics of Canada and other democratic nations. This may end and, at any rate, the mandatory retirement issues juxtapose the interests of older and younger employees in a fairly clear–cut way.

Secondly, the opponents of mandatory retirement are part of a broader movement to enhance the range of individual choice in a modernized and bureaucratized society. So far as parenthood is concerned, such things as effective contraception, surrogate motherhood and artificial insemination open up new alternatives. In large public school systems, some progress has been made in letting pupils and their parents choose schools. Traditional marriage is supplemented by a host of other familial arrangements. Those who wish to abolish mandatory rules are suggesting another range of choice for the individual in determining the time of retirement.

Thirdly, the opposition to mandatory retirement reflects changes and uncertainties about responsibilities of employers to employees. The mandatory retirement issue relates only to stable employment situations. In such situations, the responsibilities of employers are in large part spelled out in federal and provincial legislation and in contracts with unions. That a considerable doubt remains is evidenced by the large number of court cases related to dismissal of executive and managerial employees and controversies related to severance conditions when particular plants cease operations. The opponents of mandatory retirement are pressing for a range of choice in retirement age as a benefit of stable employment.

As we saw above, those who assert something as a human right are engaged in a process of narrowing the range of consequences under which this alleged right may legitimately be abridged or denied. What are some of the possible consequences of the abolition of mandatory retirement, apart from the direct consequences to persons who choose to take advantage of the new range of options?

- there may be a challenge to the interests of younger persons, employees whose opportunities for advancement are limited and/or of persons precluded from even beginning the kind of employment they would otherwise choose. LaSelva argues that the abolition of mandatory retirement does not take into account what he calls "intergenerational justice", specifically the claims of younger persons;
- in some circumstances the abolition of mandatory retirement may lead to more regular and more stringent evaluation of employees' job performance and thus compromise the relative security of tenure and protection against incompetence that some groups of employees now have. Whether and under what circumstances this would be desirable remain matters of contention. However, it seems reasonable to believe that if mandatory retirement is abolished, some employers at least would tighten up performance criteria;
- the thrust of the abolition of mandatory retirement is to perpetuate the present composition of the groups to which the new conditions are applied. At a time when it is seen as desirable to increase the number of women, disabled persons, members of visible minorities, etc., in certain forms of stable and favoured employment, the abolition of mandatory retirement will have a conservative effect;
- the abolition of mandatory retirement combined with the universality of public and private benefits to persons over 65 regardless of income results in the creation of an affluent group of seniors. It is reasonable to

suppose that ending mandatory retirement will not have a very significant effect on the least–favoured members of the labour force because in many cases these persons lack employment security and in others there are stringent and regular tests of performance which the older worker may not be able to meet. Further, the incentive of persons to retire later rather than earlier will be higher among those occupations where job–satisfaction is greatest and those occupations are usually well paid in relative terms;

- pension regimes will be affected by the abolition of mandatory retirement. There would seem to be no particular difficulties in money–purchase situations in which the individual's pension is determined solely by the yield of his or her contribution and that of the employer. However, the abolition of mandatory retirement will undoubtedly affect other plans in which there is an employer guarantee;
- the age composition of a group of persons will have some consequences for their performance apart from sheer competence in the strictest sense. For example, could a plausible case be made for reducing the age at which members of the Supreme Court of Canada must retire and in the long run the age of judges on the general ground that younger persons less removed in time from their formative legal experiences would be better able to adapt to the very new responsibilities the Charter imposes on the Court? Surely there are some consequences for Canada's role in the advancement of knowledge that the average age of university scholars is increasing and in most fields there is little rejuvenation by the entrance of younger persons into tenure–stream positions. On the other side, of course, mandatory retirement provisions may deprive the employer and the wider public of valuable contributions that older persons can make. However, it can hardly be denied that such provisions or the absence of them have important consequences for the way particular duties are performed.

Mandatory retirement provisions do not in the view of some involve the violation of a claim which can legitimately be regarded as a human right, except in those circumstances where the age of mandatory retirement is changed to the detriment of persons who entered the particular occupation under different conditions. In such a view, mandatory retirement does not constitute the violation of a right because such a regime can legitimately be justified in terms of the circumstances mentioned in the paragraphs above and perhaps others, such as the long–term planning of human resources by institutions.

Because mandatory retirement may not involve the violation of a human right, it would in the view of some be inappropriate to amend the Ontario Human Rights Act to ban this practice. Members of this school of thought indicate as well that there may be practical reasons why different mandatory retirement provisions should prevail in respect to different groups of workers and kinds of occupations in Ontario, and it would be unwise to restrict this flexibility by amendments to the Act. Quite different circumstances may prevail in occupations involving the health and safety of the public than in other occupations. The impulses to change the composition of a particular grouping of employees in terms of race, gender, etc., through a regime of mandatory retirement may be more compelling in one circumstance than another. Mandatory retirement provisions may not have much relevance to occupations in which there are frequent tests of performance but will be more important where persons have secure tenure. Mandatory retirement will have a different impact where the most senior employees have important supervisory responsibilities than in such cases as those of judges and university teachers where this is not so.

In line with the general arguments advanced above, some people argue that it would be unwise to enact provincial legislation prohibiting employers and trade unions from negotiating mandatory retirement provisions as elements of contracts reached through collective bargaining. Mandatory retirement in some circumstances juxtaposes the interests of older and younger employees; these interests can be better balanced through internal union processes than by other decision–making regimes. Employers also have legitimate interests in this issue as it relates to human resource planning and to the many ramifications of the age–composition of the group they employ. The mandatory retirement issue also has important consequences for the pension regime, consequences of legitimate

concern to both parties in collective bargaining. Where mandatory retirement is abolished, intricate balances will exist of monetary advantage and disadvantage for employees opting to retire at different ages; these balances favouring early or late retirement may best be struck through the collective bargaining process.

An argument can be made that mandatory retirement does not challenge anything which can defensibly be viewed as a human right and that many legitimate considerations might be advanced to determine what the appropriate age of mandatory retirement should be in particular circumstances. The argument is now being advanced that it is unjust to retire a person at a defined age without any demonstration that the individual is no longer competent to perform effectively. As we have seen, the mandatory retirement issue involves other legitimate interests and concerns than that of older persons. Apart from these interests and concerns, the case against mandatory retirement is for the most part made by and/or on behalf of persons whose tenure is secure and who, once having attained such tenure, have a high degree of protection against dismissal because of inadequate performance. Under such circumstances the implications of abolishing mandatory retirement entail either one of two consequences:

(1) the privileges of tenure once attained are, except in the most extreme cases of bad performance, retained by the individual until he or she decides to retire;

(2) security of tenure of such persons as judges, university teachers, physicians with hospital privileges, public servants, and so on are qualified by subjecting such persons to regular evaluations of performance stringent enough that a significant number fail to meet such tests and are thereby deprived of their occupational roles. It may be that neither of these consequences is acceptable.

Courts, Legislatures and Mandatory Retirement

The coming into effect of the Charter of Rights and Freedoms gives the courts a much more influential role than before in the definition and ranking of human rights. Section 15 of the Charter provides that:

> Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

The provisions of Section 15 prohibiting discrimination on the basis of age projects the courts into a role in the mandatory retirement issue. It should, however, be recognized that even if the courts should rule that mandatory retirement was a contravention of Section 15, this would not make the practice illegal in all circumstances. Section 32(1) of the Constitution Act, 1982, provides:

> This Charter applies,
>
> (a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories, and
>
> (b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.

Section 32(1) in effect confers on the courts, in the last instance, of course, the Supreme Court of Canada, the scope of the operation of the Charter. In the context of the mandatory retirement issue, the judges have the last say, not only about substance but about the range of institutions and occupational roles affected; to take a specific example, whether universities and/or hospitals are included within "the legislature and government of each province".

It is not the purpose of this chapter to analyze the legal and constitutional issues involved in mandatory retirement. Some people even believe it to be unfortunate that age was included as a prohibited ground of discrimination in Section 15. Nonetheless, the fact remains that age is a prohibited ground and both governments and the courts are now faced with this new reality. While there are, on the basis of the above conceptual analysis, reasons for concluding that the specified categories in the Charter such as colour, nationality or ethnic origin, religion and sex, constitute basic human rights which can be differentiated from age, the Charter itself does not make this distinction. Should, however, a provincial government, for example, wish to exclude age as a prohibited ground it could do so by using the overide provisions of Section 33 of the Charter.

3

The Conflicting Interests of Older and Younger Workers

The Ontario Labour Force: An Historical Overview

In considering a ban on mandatory retirement, many have pointed to a possible conflict between the interests of older and younger workers. Most of this discussion focuses on employment opportunities and the degree to which these might be curtailed for young people if older workers decide to remain in their jobs beyond age 65. This chapter examines Ontario's labour force from this perspective, and it attempts to estimate the number of employment opportunities that could be affected by a ban on mandatory retirement. The issue of higher benefit costs for older workers — and how these higher costs may be borne by younger workers — is also addressed.

During 1976–86 the number of people in Ontario over age 15 increased by approximately 1,070,000, from 6.1 million to 7.2 million. Only 700,000 of these persons, however, joined the labour force. Above and beyond this population increase, participation rates growth added a further 300,000 persons to the labour force, resulting in a total expansion of over one million people. By 1986 the labour force had reached almost 5 million persons. Over the last decade, therefore, population expansion contributed 70 percent to labour force growth while participation rate growth the remaining 30 percent.

At the same time, over 900,000 new jobs were created in the province. Employment growth, while substantial by historical standards, did not match labour force growth and thus the number of unemployed expanded by over 100,000 persons over the decade. This represented an increase of 0.8 percentage points in the unemployment rate for the province over the decade.

Females have grown from 39 percent of the provincial labour force in 1976 to almost 44 percent in 1986. Since the age structures of the male and female populations are very similar, this difference in growth rates (1.5 percent p.a. for males and 2.3 percent p.a. for females) is attributable to differences in participation rate performance over the decade. Dramatic increases in participation rates for females to age 55 are apparent. Even in the 55 and over group the changes are noticeably higher than for comparably aged males, where substantial declines are reported especially during 1981–86.

These changes in labour force growth and composition were reflected, along with the structure of employment growth, in unemployment rates. Consider first the youth group, aged 15 to 24, which has always experienced the highest unemployment rate: over 80 percent above the provincial average until the early 1980s. As the baby–boom generation grew out of this group, the ratio began to fall even though the youth unemployment rate reached record high levels over 1982 and 1983. In essence, youth fared relatively better over the recession of the early 1980s. The opposite trend is apparent among young adults aged 25 to 34, where unemployment rates more than 10 percent below the provincial average over the late 1970s have been recently replaced by rates above the provincial average.

Thus it appears that the unemployment problem is aging with the baby–boom generation. Although youth unemployment rates remain above the rates of young adults, the gap has narrowed from above 6 percentage points over the late 1970s and a high of 8.2 percentage points in 1982 to 4.3 percentage points by 1986. A similar trend might be expected to emerge among the 35 to 44 age group but it is not yet apparent. Given the relatively slow labour force growth of the 45 to 54 age group over the decade, no such trend can be found in relative unemployment rates for this group. However, in the 55 to 64 age group unemployment rates, while absolutely lower, have been creeping upward relative to the provincial average over

---

For further reference: David K. Foot, *Mandatory Retirement: A Demographic Perspective*,a report commissioned by the Task Force.

the 1980s. This reflects, in part, the rapid growth in the labour force in those ages over the decade.

How Many would Delay Retirement if Mandatory Retirement Were Banned?

Evidence from surveys in Canada indicates that approximately one–half of the work force are in jobs subject to mandatory retirement provisions. The Economic Council of Canada (1979) indicated that approximately 48 percent of full–time employees aged 55 and over were in jobs with mandatory retirement provisions. In addition, the Conference Board in Canada noted that approximately 54 percent of employees work for employers with pension plans and are affected by mandatory retirement policy. Since these numbers were obtained prior to the abolition of mandatory retirement in Quebec, they likely represent workable figures for the labour force in Ontario. This would suggest that approximately 2 1/2 million workers in Ontario are subject to mandatory retirement provisions.

The same Conference Board survey found that over 70 percent of employees currently entering the "retirement years" who work for an employer with a mandatory retirement age have left the organization before normal retirement age of 65 and are therefore not subject to mandatory retirement provisions. Of all employees currently aged 55 and working for an employer with a pension plan, the Board found it probable that:

- 15 percent will die before age 65;
- 6 percent will be laid off and will not find another job;
- 50 percent will retire before age 65, either because of poor health or the early retirement provision of their pensions;
- 25 percent will retire at age 65; and
- 4 percent will work beyond their 65th birthday.

Consequently, of 100 employed persons aged 55, a maximum of 29 could consider working past age 65 in the absence of a mandatory retirement policy. Alternatively, a maximum of 25 of the remaining 75 persons (or one–third) who survive and are not laid off or work beyond their 65th birthday "could be compelled to retire."

Exactly how many workers would elect to defer retirement if mandatory retirement provisions were eliminated is unknown. It is likely that some of the 25 percent of 55–year–olds who will retire at age 65 in the Conference Board survey may be retiring voluntarily. What proportion are involuntarily constrained by mandatory retirement provisions is unknown. The Economic Council indicates that, of those workers who planned to retire at mandatory retirement age, less than 2 percent were unwilling to retire. It remains unclear whether this reflects the fact that many do not expect to actually face mandatory retirement, or that if they do, they will then feel the same way.

In 1986 there were 488,000 persons in the Ontario labour force aged 55 to 64 years and a further 70,000 persons 65 and over. Of these, 461,000 and 69,000 persons were employed, of which 404,000 and 57,000 persons respectively were employed full–time. Using the Economic Council of Canada's estimate of 48 percent for full–time employees aged 55 and over implies that 221,000 employees entering their "retirement years" in Ontario were in jobs with mandatory retirement provisions in 1986; 57,000 of these were already working beyond age 65. Of the remaining, applying the Conference Board's maximum 29 percent figure to the entire group of 55 to 64 year olds employed full–time estimated to have mandatory retirement provisions implies that 56,000 persons could consider working past age 65 in the absence of a mandatory retirement policy over the next ten years. This averages 5,600 persons a year over the next decade.

Although the Conference Board figure is a maximum, these calculations might still be considered conservative because the relevant percentage likely increases with age, and all part–time workers have been ignored. Arbitrarily using a 50 percent figure as a representative weighted average for the entire 55 to 64 age group and including all part–time employees would double the figure to 110,000 persons over the next decade or an average of 110,000 persons over the next decade or an average of 11,000 persons a year. These calculations suggest

a planning range of between 5,000 and 10,000 additional persons a year over the next decade who could consider working past age 65 in the absence of a mandatory retirement policy.

Alternative estimates of the numbers of workers who would voluntarily elect to work past mandatory retirement age based on the entire labour force can also be found in the literature. The Conference Board estimates that at most 0.2 percent of the Canadian labour force (23,000 persons out of 11.231 million persons in 1979) could be compelled to retire against their wishes due to a mandatory retirement policy in any given year. Approximately one–half of the labour force earns less than the average industrial wage and, for this group, public pensions together with private pensions received at age 65 provide a relatively high net income replacement ratio on retirement. So there is little financial incentive for these people to work beyond age 65, which reduces the estimate to 0.1 percent of the labour force likely to be mandatorialy retired in any one year.

Assuming these Canadian figures are applicable to Ontario suggests that, with a 1986 Ontario labour force of 4.897 million persons, a maximum of 9,800 persons a year and a more likely figure of 4,900 persons a year are likely to be retired because of a mandatory retirement policy. Once again a planning range of between 5,000 and 10,000 persons a year in the province affected by mandatory retirement provisions is obtained.

A separate study based on the 1975 Retirement Survey, estimates that about 7 percent of those persons subject to mandatory retirement, or 3 percent of all employees in Canada, are prevented from later retirement due to this factor. Applying this estimate to the 461,000 employed in Ontario aged 55 to 64 results in 13,800 persons a year; limiting the calculation to the 404,000 full–time employed, which was the basis of the original survey, yields an estimate of 12,100 persons a year affected by this provision. Thus these calculations suggest numbers at the upper end of the above planning range.

An analysis of the effects of the increase in the retirement age from 65 to 70 in the United States effective in 1979 estimated an approximately 0.2 percent increase in the U.S. labour force.

In summary, the effects of abolishing mandatory retirement on the Ontario labour force cannot be estimated with certainty. Fragmentary evidence suggests that, in the short–run, between 5,000 and 10,000 employees a year could be affected based on the 1986 Ontario labour force of 4.9 million persons. A U.S. study suggests that as people adjust to the change, longer–run impacts could be larger. The impact of the recent introduction of a flexible retirement package into public pensions in Canada on the effects of abolishing mandatory retirement is unknown. If employees retain the option of working beyond age 65 but commence receipt of full entitlement at 65 the effects are likely to be minimal. However, if these employees are required to avail themselves of the flexible retirement package, the new "wholly or substantially ceased employment" provision is likely to limit impacts since the option of combined substantial employment and pension income is removed without some period of interruption in employment.

The Impact on Job Opportunities for Younger Workers if Mandatory Retirement is Banned

The presence of these additional workers in the provincial labour force could have ramifications on job opportunities for younger workers, many of whom have already been adversely affected by the presence of the large baby–boom generation. Consider the impact of an additional 10,000 workers aged 65 and over and assume initially that no new jobs are created. The result is an increase in unemployment, presumably of younger workers.

Based on 1986 data, 10,000 additional workers in the 65 and over age group would increase their participation rate from 7.5 to 8.6 percent. If this was at the expense of 10,000 jobs in the 25 to 44 age group, their unemployment rate would increase from 6.2 to 6.6 percent. A loss of only half that number of jobs (the remainder presumably declared redundant and hence unfilled) would increase the unemployment rate to a lesser 6.4 percent; if these 5,000 jobs were

concentrated in the 25 to 34 age group their unemployment rate would increase from 7.2 to 7.6 percent.

These calculations represent the effect if potential retirees spend an average one additional year in employment. If this is increased to an average of 5 additional years on the job, the accumulated impact on employment of 10,000 persons a year will equal 50,000 persons over 5 years. If these jobs were then not available to the 25 to 44 age group, their unemployment rate would increase by 2 percentage points, a significant amount. The longer the average additional length of duration in employment as a result of the abolition of mandatory retirement, the bigger this impact. Note, however, that once the average time of additional employment has passed (after 5 years in the above example), a flow equilibrium will be reestablished at the new higher unemployment rates, assuming that 10,000 more persons retire at age 70 when 10,000 more continue working past age 65.

Similar calculations can be made for other age groups and for a variety of assumptions about the average length of additional employment, for substitution possibilities of younger workers for older workers and for the replacement proportion of older workers on retirement.

The issues raised by these calculations are much broader. First, the labour force increase occasioned by the abolition of mandatory retirement (similar to the influx of baby–boomers) will likely result in increased unemployment rates if wages are sticky, or lower wages if they are not, or some combination of the two. Second, some proportion of the employment retained by the older workers will likely become unavailable to younger workers, thus raising their unemployment rates (or lowering their wages). Third, this effect will be cumulative over the transition period as successive cohorts of potential retirees have the opportunity to remain in employment. Fourth, it is likely that the impact will be felt most by the baby–boom generation who have reached the ages when they are firmly entrenched in the labour force but are generally at the lower rungs of the hierarchical ladder. Fifth, this generation has already suffered a period of high youth unemployment and is now experiencing increasing relative unemployment rates in the young adult age groups — not to mention the frustrations associated with the economic deprivation of higher unemployment and/or lower wages such as delaying marriage, childbearing and home ownership. Finally, and perhaps most importantly, it can be argued that these workers deserve the same rights as the older workers — namely, the right to a job opportunity. The elimination of mandatory retirement could remove this opportunity for a significant number of baby–boomers who have already experienced labour market deprivation in their short working lives.

The Implications of Future Projections of Demographic Change

The estimates presented above may be affected by future demographic changes. This section investigates the impact of possible demographic changes on the numbers of persons in the province affected by mandatory retirement provisions. The next section draws out the implications of these projections for labour force growth and composition, and hence future retirement patterns.

Uncertainties are introduced into the aggregated projections by future fertility, mortality and migration levels, both international and interprovincial. Alternative population projections have been developed conditional on feasible alternative scenarios of these determinants.

It is worth noting that all who will be affected by mandatory retirement in the foreseeable future are already born. Moreover, they are of labour force age. A 15–year–old entering the provincial work force in 1986 will be eligible for early retirement under the C/QPP at age 60 in 2031. The bulk of the baby–boom currently in their twenties will be eligible for retirement earlier, around the middle of the second decade of the next century and the leading edge of the baby–boom is only 20 years away from early retirement eligibility. It must be emphasized, however, that although these persons are already born they are not necessarily all currently resident in Ontario. Migration will result in some new people coming into the province and some current residents leaving. In this sense alternative fertility patterns are of less interest than

alternative migration patterns in determining the impact of mandatory retirement on the future labour force.

Population projections for the year 2001 show a consistent pattern of low populations projected for lower fertility rates and net migration levels, and higher populations for higher fertility rates and net migration levels. The range of projected populations is between 9.7 and 10.8 million persons (the 1986 population being 9.1 million persons).

This is a substantial range. Nonetheless all projections represent a slowing in population growth over this period compared to the past 15 years. If desired, the range can be narrowed by focusing on the medium fertility/medium migration alternatives. Medium fertility used current fertility rates, which imply an average of approximately 1 2/3 children per woman, well below the replacement level of around 2.12. Medium migration incorporates a net inflow of persons into the province of slightly over 30,000 a year, likely composed of about 75 percent net international and 25 percent net interprovincial migration. These reflect a variety of immigration, emigration and interprovincial migration assumptions. The population projections represents an average annual population growth of 0.7 percent down from 1.1 percent over the previous 15 years.

Despite the relatively wide range of projections, the compositional changes are similar. All projections indicate a continuation of the aging trend: from a median age in one projection by Statistics Canada of around 32.4 years in 1986 to between 36.7 and 39.4 years by the turn of the century. All indicate an increasing size and proportion of the population in their retirement years, from 1.406 million persons to 1.493 million — all dramatically increased over the estimated 1986 level of 1.006 million persons (11 percent). In other words, regardless of fertility and net migration assumptions, persons aged 65 and over will increase appreciably in absolute numbers and as a proportion of the provincial population.

As noted above, the 55 to 64 age group is particularly relevant to any study of mandatory retirement. Projected numbers in this group show a population of over one million, averaging around 10 percent of the provincial population, up slightly from under 900,000 persons averaging around 9.7 percent of the population in 1986. In other words, between 1986 and 2001 the early retirement age group will not grow nearly as rapidly as the post–65 age group.

This phenomenon is a reflection of the low fertility (and very low immigration) era of the 1930s, which reduced the growth potential of these cohorts who will be entering their "early retirement" years over this period. Those reaching age 65 between 1986 and 1996 were born in the 1920s and form a comparatively larger group. This suggests that the number of persons potentially facing mandatory retirement is likely to grow more rapidly over the 1986–96 decade than over the subsequent decade. Thus, based on the growth of the over 65 population alone, mandatory retirement was a "bigger" issue over the past decade (1976–86) than it will be over the coming decade (1986–96) and, especially, the subsequent decade (1996–2006). Perhaps contrary to popular perception, the growth in the 65–and–over population will decline over the next two decades, but then it will grow rapidly again over the subsequent two decades (at around 2.4 percent p.a. — still below the rate over 1976–86) as the baby boom reaches retirement age. Moreover, these growth rates are almost totally insensitive to choice of population projections.

Calculations using current (1986) participation rates suggest a provincial labour force of between 5.3 and 5.4 million persons by the year 2001; that is, an increase of 400,000 to 500,000 persons due to population growth and aging alone. These calculations imply an annual labour force growth averaging around 0.6 percent without any change in participation rates. The growth over the last decade in Ontario is very much influenced by interprovincial immigration patterns. The movement of population to the west over the late 1970's and their return over the early 1980's tended to equalize the source population growth over the decade. Canadian figures, which are unaffected by interprovincial migration patterns, show a more substantial decline, from over 1.9 percent p.a. over

1976–81 to under 1.3 percent p.a. over 1981–86.

In the year 2001 the Ontario labour force is projected to include slightly more than 550,000 persons in the early retirement, 55 to 64 group, and approximately 100,000 persons in the 65 and over group, compared to 488,000 and 70,000 persons respectively for 1986, a total increase in both age groups of 70,000 persons. These numbers represent a growth of 0.0 percent p.a. in the 55 to 64 age group and a substantial 2.4 percent in the 65 and over group, both greater than the projected overall growth of 0.6 percent p.a.

The above hypothetical calculations hold participation rates constant at 1986 levels. As noted previously, participation rates have been changing over time with some, notably female, rates increasing and others, notably males and older age groups, declining. Overall, the labour force participation rate grew over the 1976–86 decade at an average 0.7 percent p.a., although the growth clearly slowed in the 1980s relative to the late 1970s. Assuming that this growth will continue over the next 15 years yields an average annual total labour force growth of 1.3 percent in the province resulting in a work force of a little under 6 million persons by 2001. This is an increase of over one million persons in the labour force of the province over the next 15 years.

Such a calculation is, however, somewhat unrealistic since the age composition of the labour force is changing, with increasing numbers in the higher age, lower participation age groups. This will tend to slow growth in the aggregate participation rate. For example, application of the 1986 age–gender specific participation rates to the estimated population in 2001 produces an aggregate participation rate almost three percentage points lower.

This means that instead of an aggregate rate of around 76 percent in 2001, it could be 3 percentage points lower at 73 percent. This represents an annual growth rate of around 0.4 percent and a labour force growth of 1 percent p.a., well below the 3 percent annual growth rates of the 1960s and 1970s. A 1 percent p.a. growth rate implies a provinical labour force of around 5.7 million persons by 2001, an increase of 800,000 persons over 1986.

Of particular interest are the numbers in the older age groups under these conditions. Here the situation is not as easy to ascertain because, while there has been a general trend towards increasing participation rates, the participation rates of older workers have been declining. This indicates a trend towards early retirement.

Arbitrarily assuming that the same amount of change takes place over the next 15 years as over the last 10 (that is, the pace of change is slowing) results in around 600,000 workers in these age groups by 2001 up from 558,000 in 1986.

Of these, approximately 540,000 workers would be aged 55 to 64, up over 50,000 from the 1986 figure of 488,000; the remaining 60,000 would be over 65, down from the 1986 figure of 70,000. Note that in a labour force of 5.7 million persons these older age groups represent about 11 percent of the labour force, down slightly from the 1986 figure of 11.4 percent. This reflects the assumed continuation of a predominant trend towards early retirement in these groups.

With an assumed unemployment rate of 5 percent this means that compared to 1986 there will be around 47,500 additional employees in 2001 aged 55–64. Assuming that 50 percent of this 10 year group could consider working past age 65 in the absence of a mandatory retirement policy suggests an average increase of slightly above 2,000 persons a year affected by these provisions by 2001 compared to 1986. This brings the upper end of the planning range to around 12,000 persons a year by 2001. This figure is corroborated by the calculation of 0.2 percent of a labour force of 5.7 million persons, which represents approximately 11,500 persons a year. Should this figure actually be closer to 0.1 percent (as suggested by the Conference Board), the impact is around 6,000 persons a year, while if it is 0.3 percent, around 17,000 persons a year would be affected.

The Argument that the Job Market will Automatically Adjust

Profesor James Pesando has argued that in economic theory a national market will adjust automatically to create the necessary number of job openings; government monetary and fiscal policies can ensure this adjustment. Any increase in the labour supply caused by a mandatory retirement ban will automatically lead to an increase in the number of jobs because of the demand–augmenting aspects of increased entry into the labour force.

An additional point deserving emphasis is that the need to introduce new equipment and new processes means that a corporation will not automatically hire a new employee to fill the job left by a retirement. Often a retirement is not replaced. Hence the presence or absence of mandatory retirement does not affect the number of job openings in a direct one–to–one manner.

Finally, demographic projections reveal a sharp drop in Canada's birth rate. This will result in future labour shortages. The current unemployment problem will become a labour–shortage problem. To the degree that a mandatory retirement ban will increase our labour supply, it will actually be helpful in the future.

The Argument that this Conflict of Interests is Considerable in Particular Situations

The economy's adjustment to the increase in labour supply will require time and expense. It may also require wage decreases.

Retraining or extended education may be necessary as part of the adjustment process. In all of this, some individuals and corporations will suffer.

For society as a whole, this adjustment involves costs. For individuals and corporations affected, costs may be substantial. The following situations illustrate these substantial costs and resultant conflicts.

The Town or City with One Principal Economic Activity

In its brief to the Task Force, the Paper Workers' Union has emphasized that mandatory retirement can be directly linked to job openings for youth.

> Our Union believes that mandatory retirement significantly facilitates retention of job opportunities in isolated communities and the forest industry as well as incomes for its dependent communities. As older workers retire, the existing workers are promoted, opening up opportunities for younger workers, who would otherwise have had to leave their communities to find employment.
>
> In small ... one–industry towns ... which are sustained by a pulp or paper mill ... young people come out of school and look at how the work force has aged to decide whether they are going to stay in town or not. If they anticipate many retirees this year, they might stick around and hope to get a job in the mill. If they do not see too many retirees on the horizon, they will ... seek employment elsewhere.
>
> One of Canada's most serious problems at the present time is the unemployment of our young people. There are far too few employment opportunities to satisfy the needs of those young persons who have finished their education and are seeking careers. Legislation which permits older workers to continue to hold their jobs beyond the mandatory retirement age, coupled with the unions' commitment to job security and job preference based on seniority, will further reduce the opportunities for younger workers.
>
> A case in point is the present situation in the mining industry.
>
> Increasingly competitive business conditions over the past several years have forced most companies in the mining industry to strive to increase efficiency by improving productivity. To ensure their survival, companies have been forced to cut costs by rationalizing operations and reducing work forces.
>
> Reductions of work forces are normally achieved through lay–offs based on reverse seniority, affecting the younger, normally highly productive and more adaptable employees. This results in aging, less adaptable work forces.
>
> Under these circumstances, attrition, which provides the only job opportunities for younger workers, is low and the abolition of mandatory retirement will lower it even further, thereby denying more young workers the opportunity of employment and the companies the energetic and adaptable employees necessary to ensure their future.

The Occupation with a Limited Number of Jobs

In occupations with a certain number of jobs (schools, universities, doctors, managerial and policy–making positions, for example), it may be necessary for someone to retire in order for a young person to gain entry. Abolition of mandatory retirement may block opportunities for young people in particular types of jobs.

Douglas Wright, President of the University of Waterloo, has stated to the Task Force:

> As a University President I am deeply concerned about the effect on universities of an interpretation of the Charter of Rights or a change in law which allows university professors, or other university employees, to remain employed beyond the age of sixty–five. The future of Canada and the future of universities will be negatively affected if orderly retirement does not provide university positions for Canada's talented young people.

John Daniel, President of Laurentian University, has told the Task force:

> In the specific case of the universities, because of the perhaps unusual compensation system universities have, the replacement is probably not one–to–one but more like one and a half, or even two, to one. If you have a faculty member retiring on a salary ... of $70,000 a year, and the hiring cost of a young lecturer or assistant professor with a Ph.D. is in the order of $30 – $35,000 ... you can afford two of one for the salary of the other. And that is why this ... term "faculty renewal" is used so often. So, that, particularly in a small institution like our own, to have a high salary continued for one, two, three, four, five more years does have a very tangible effect on not being able to add — not just one, but more people at the lower end.
>
> The proportion of tax dollars going into higher education is unlikely to vary significantly over the foreseeable future, and if that is true, the total amount of money to pay faculty is not going to vary significantly. And, if that is true, the younger those faculty are, the more of them there will be, barring a dramatic change in the way that faculty are compensated."

The Ontario Graduate Association also emphasized these issues in its brief to the Task force:

> **Tenure**
>
> Tenure is a vital component of academic life. The protection it gives faculty to pursue unpopular or unusual areas of research is an integral bastion in the defence of academic freedom. The corollary of this defence of freedom is that it becomes enormously difficult to find grounds for dismissing someone. The two main components of a faculty member's job are teaching and research. No formal training is required to teach at a university. It follows that if one knows one's area and can talk, one can teach. Dismissing someone for incompetent teaching would therefore be almost impossible. Incompetence would have to take the form of not turning up. On the face of it, research performance offers an easier criterion for assessing performance. This is not the case. One could simply count published work in peer reviewed journals. This is not much use. On the one hand it may well be possible to routinely churn out publishable papers, but this is of little value if the contents do nothing to further our knowledge. On the other hand it is quite possible to spend years ardently following an avenue of research which only in the last analysis shows itself to be blind. This is not the stuff of journal articles but it is the essence of academic freedom.
>
> While everyone agrees that incompetent academics, whatever their age, should be dismissed, the task of finding a method for doing this while protecting academic freedom is like steering between Scylla and Charybdis, possible but devilishly difficult and fraught with danger.
>
> **The Age Profile of Ontario Faculty**
>
> The hiring boom of the sixties, followed by a period of constrained financing for universities has resulted in a bulge in the age profile of Ontario faculty. More than forty percent of faculty are aged between forty and forty–nine, whereas less than eleven percent are aged less than thirty–five. One result of this bulge is that there is an appalling paucity of academic jobs available for the current crop of graduate students. This is important for a number of reasons:
>
> a) The atypical age distribution results in a lack of diversity in approach and interest that would be the result of a broader spread of ages. This is detrimental to both teaching and research.
>
> b) As faculty salaries increase with age, wage costs will increase as the faculty gets older. C.O.U. estimated in 1984 that wage costs would increase by ten percent by 1989 without any increase in complements simply as a result of payments for "progression through the ranks". Increasing wage costs will place increasing pressure on student/teacher ratios which have already been hard hit by financial restraints.
>
> c) Current full–time tenured faculty are almost exclusively men. The scarcity of women faculty is a disgrace for the province, a constriction of education and an affront to women. Many universities have taken steps to redress this imbalance but with the paucity of available positions little progress can be made. Unless mandatory retirement is maintained and a chance created to change the profile of our faculty, we will continue this outrage until well into the next century.
>
> d) The lack of academic jobs puts pressure on graduate students to delay completion of their degrees. The average time taken for a Ph.D. in the Humanities at the University of Toronto has risen from around four years ten years ago to more than six years now. One cannot attribute this rise to any single factor

but it is reasonable to assume that dim job prospects play a contributory role. This increase is problematic for a number of reasons. It means a slowing up of passage through the system which results in fewer places in graduate school for new students. It makes graduate school less attractive to new students as the time to be spent in penury increases. The extension of poverty for graduate students means that they are forced to delay having families until they have jobs, an unlikely prospect before one is thirty. It places even greater burdens on women who are forced to delay child bearing until their thirties, just at the time they might expect to eventually begin their academic careers. More academic jobs for new Ph.D.s would mean greater incentives to finish quickly and get into the work force. This would alleviate all of these problems.

A brief to the Task Force by a university professor has also emphasized that:

> In economic activities with a fixed or decreasing number of jobs, retirement may be the only way of creating job openings. In these situations, a mandatory retirement ban would result in a significant aging of the work force.
>
> At this time in history, our industrial structure is changing rapidly. Many corporations are experiencing job losses because of substitution of machinery for labour. Others are victims of the increasing international competitiveness, with the shift of jobs from Canada to the newly industrialized countries.
>
> Our educational system is at a plateau in terms of the number of teachers and professors required. Perhaps requisite numbers are even falling. An aging labour force may result in a quality of teaching and research that will be lower than it would be with new entrants. Young teachers and professors would bring fresh ideas and the latest research expertise. The aging trend that would accompany a mandatory retirement ban could hurt the entire society, including the students; the corporations who rely on the quality of these students and who rely on the implementation of university research.

A different view was presented to the Task Force by the Canadian Association of University Teachers and the Ontario Confederation of University Faculty Associations. The CAUT, in its brief to the Task Force, stated that:

> In a brief presented to the Special Senate Committee on Retirement Age Policies in 1979, CAUT took the following position:
>
> On the question of mandatory age of retirement ... there should be a flexible system which would allow early retirement without actuarial penalty, an equitable voluntary half-time status, an adequate pension at 65 for those who wish to retire at that age, and the right for those who so desire and remain capable of doing so to continue in employment.

Universities in the 1960s underwent a period of expansion supported by increased government funding, and there was a corresponding increase in the number of faculty hired during this period. In the late 1970s and early 1980s the number of new faculty hired each year decreased greatly. This was in part a response to a levelling off in the growth of the number of students (the number of students continued to grow throughout this period but the increase was as a slower rate). Since the number of students was actually increasing, enrolment change was not the reason for the lack of faculty hiring. The major reason was the under funding of the university system. Support for universities on a per student basis dropped by some 20 percent nationally in real terms between 1977 and 1984.

We should not confuse or intermix factors. With or without mandatory retirement governments will still have to make decisions about the level of funding for universities which will influence the hiring policies of those institutions. There have been suggestions on how to address some of these questions. The Bovey Commission in Ontario recommended the establishment of a one-time faculty renewal and bridging fund to finance five-year appointment terms for approximately 550 faculty during the period 1985 to 1989. This number is in addition to any replacement of retiring faculty. The new Liberal government has begun to implement this idea. Some hirings under this program have occurred in the fall of 1986.

Indeed, the Bovey Commission, despite its concern over faculty renewal, recommended against the enactment of legislation to override the effect of Section 15 of the Charter, which it assumed would lead to the elimination of mandatory retirement in universities. It also suggested that the emphasis in government policy should be on increased funding targeted on the hiring of new faculty.

The Ontario Confederation of University Faculty Associations expressed similar views in its brief to the Task Force.

> Our view is that mandatory retirement is unjustified and unjustifiable discrimination on the basis of age (a legal and social observation); and that the consequences of ending mandatory retirement will be generally positive, and if there are difficulties they can be accommodated. To these general points, we add one observation especially about universities, namely that there is nothing in the nature of the employment relations at universities that, for these purposes, set them apart from any other sector of the economy.
>
> On the matter of discrimination, we take the Charter as an enunciation of social policy, a policy that sees age discrimination as invidious. A great deal of human learning consists of showing how entities are different, or how they are similar. We are not arguing that being old is no different than being young. Neither are we arguing that distinctions cannot be made in matters of social policy. What we do argue is that the particular distinction based on age that requires people to retire from work at a set age makes no sense and is therefore discriminatory.

Who Will Pay the Higher Benefits Costs Associated with Older Employees

The costs of some benefit programs rise with age — life insurance, health, dental, long term disability, and others. To the degree that older workers do not directly pay for these extra costs, others may be prejudiced by a mandatory retirement ban. The employer may pay part or all of the higher costs. If the corporation levies a uniform fee from its employees, then young workers will pay part of this cost.

If mandatory retirement were prohibited, there would undoubtedly have to follow a number of adjustments to employment–based benefit programs, which have in many cases been specifically geared to a particular age of retirement. The rights to certain benefits would have to be extended past the present retirement age. In some cases, there would be significant increases in unit costs per employee, since costs for life insurance and group health coverage for older workers rise rapidly with age. The impact on these costs in prohibiting mandatory retirement would generally be borne by younger workers.

4

The Retirement Decision

Current Trends in Retirement

The Significance of Retirement Income

The pension plans developed through many decades are society's recognition that the years of retirement should be as comfortable, pleasant and meaningful as possible.

The level of retirement income is far more important in the retirement decision than are corporate rules of mandatory retirement.

As stated by the Federal Superannuates National Association in its brief to the Task Force:

> In essence, the question of mandatory retirement can only be given meaningful consideration in conjunction with that of the provision of adequate pension arrangements for all employees. Our experience leads us to believe that the single most important consideration determining the average employee's retirement age objective is the associated adequacy of his or her anticipated retirement income.

In many countries, the trend in the mean age of retirement during the 1970s and 80s has been down, largely because of improved pension plans and income support for the senior population. The Ontario Federation of Labour told the Task Force that voluntary retirement before the age of 65 would be more tempting if the pension system provided an adequate income on such retirement. The Canadian Auto Workers Union also emphasized to the Task Force the significance of expected retirement income in the decision to retire.

In their brief to the Task Force, the Ontario Federation of Labour pointed out that:

> Labour and its allies have been in the forefront in the fight for adequate pensions so that workers could retire. Pensions are the key issue, and they must be improved. Women especially must have access to the same benefits that men have, by narrowing that 40 percent differential between men's and women's incomes, and by providing women access to pensions, with an adjustment for their years of child bearing.

In its brief to the Task Force, the United Food and Commercial Workers International Union stated that:

> To date, most unions have concentrated their efforts on reducing the normal retirement age, in order to allow workng people the opportunity to leave what are often stressful, exhausting and physically demanding jobs. However, if a group of workers decides that they would prefer an open-ended retirement age, we believe there should be no legal obstacles to making such a provision a priority at negotiations

Since the C/QPP was introduced, private pensions have moved towards earlier retirement. Retirement at age 55 is quite common, and "30-and-out" arrangements have been negotiated in certain industries, such as the automobile. During the recent recession many companies introduced early retirement incentives as a way to reduce staff and make way for younger employees.

These arrangements are predicated on a simple fact: If you offer workers an adequate income, most will freely agree to forego the daily grind of work. Only a small fraction will continue working for the so-called "psychic" benefits.

Discussing the economics of retirement, the United Steel Workers of America, District 6, has noted for the Task Force that:

> It has been over 60 years since the issue of retirement income first found its way into Canadian legislation with the introduction of the old age pension. Since then, there have been many changes: the old age pension has evolved into Old Age Security; the income tested Guaranteed Income Supplement has been added; the Canada Pension Plan has grown almost to maturity; almost every jurisdiction in Canada has developed elaborate mechanisms for regulating private pensions; and federal income tax law has been amended to pump billions of tax dollars into subsidization of retirement saving through RRSP's.

Early and special retirement provisions in pension plans and provisions may encourage retirement before the normal retirement age of 65. Furthermore, these provisions might serve as a *substitute* for mandatory retirement if the latter were banned. Could employers make early retirement so attractive by enriching these provisions that few (if any) employees would postpone retirement beyond the normal age? Could these provisions affect male and female

employees differently, currently and prospectively?

In their brief, the United Steel Workers of America focused on financial security as the crux of the problem:

> Our primary focus as a society when it comes to issues related to aging must be to provide for an adequate economic basis for retirement. And to the extent that any issue of flexibility is important, it is the need to make it economically possible for those Canadian who want to retire early to do so.

The Trend Towards Earlier Retirement

We have examined participation rates for males and females in Canada by age cohort for 1971 to 1985. (Because of changes in the way the labour force is measured, participation rates before and after 1975 are not strictly comparable. Nonetheless, the differences are not large and do not obscure basic trends.) The participation rate of males aged 55 to 64 in 1985 stood at 70.2 percent, down sharply from 83.0 percent in 1971. For females 55 to 64 the participation rate rose slightly during this period: from 30.1 to 33.8 percent. This modest increase must be seen within the context of the dramatic rise in overall participation rates for women, which for females 45 to 54, for example, jumped from 42.1 percent in 1971 to 61.3 percent in 1985.

The data confirm the trend toward earlier retirement by males. The data also indicate that the participation rates of older females, although higher in 1985 than in 1970, have declined *relative* to the participation rates of younger females.

The Incidence of Early and Special Retirement Provisions

We have examined data on the incidence of early and special retirement provisions in private sector plans in Ontario for 1984 and 1974. Early retirement provisions are virtually universal, while the incidence of special retirement provisions has increased sharply in the past decade.

Early Retirement

Once a plan member has qualified for *early retirement*, the member can retire at anytime and draw an immediate, but *reduced*, pension benefit.

There are two common requirements for early retirement: (1) the attainment of a minimum age, usually 55; and (2) the completion of a minimum number of years of service. By far the most prevalent requirements are age 55 and the completion of 10 years service.

The qualified member may be eligible for an actuarially reduced pension benefit, in which case early retirement is *not* subsidized. Alternatively, the pension benefit may be reduced by a specified formula, such as 5 percent for each year that early retirement precedes the normal retirement age set by the plan.

Consider the case of a 55–year–old plan member eligible for a pension of $10,000 per year, to commence at the normal retirement age of 65. If the plan member is male and is qualified for an actuarially reduced early retirement pension, he will receive an immediate pension of $3,169 if the interest rate is 8 percent, and $2,711 if the interest rate is 10 percent. This reduction compensates for the fact that the pension is payable immediately *and* over a longer life expectancy. The employer's cost does not change.

Most reduction formulas provide an implicit subsidy to early retirement. Suppose the 55–year–old qualifies for early retirement, subject to a reduction formula of 5 percent for each year early retirement precedes normal retirement age of 65. If the 55–year–old elects early retirement, the pension will equal 50 percent of the pension due at the normal retirement age of 65, or $5,000 per year. At 8 percent interest, this exceeds the actuarially reduced pension of $3,169 by 58 percent; at 10 percent interest, this excess equals 84 percent. So long as the market interest rate exceeds 2 percent, this reduction formula provides a subsidy to early retirement.

Special Retirement

Special retirement provisions set forth conditions under which a plan member may retire before the normal retirement age with an *unreduced*

pension. In 1984, 30.0 percent of members of private sector, earnings–based plans in Ontario and 53.8 percent of members of flat benefit plans were eligible for special retirement. The pension is payable immediately, but there is no reduction in the pension benefit, so special retirement involves a large subsidy.

Special retirement provisions are generally directed toward the older, long–service employee. Consider earnings–based plans. Of those members eligible for special retirement in 1984, 17.8 percent had to attain age 60 and meet a service requirement while 46.7 percent had to attain age 61 to 64 and meet a service requirement. In about half the cases the service requirement equalled or exceeded 20 years. Only 7.8 percent could qualify before age 60 but typically had to have completed 30 or more years of service.

Of those members of flat benefit plans eligible for special retirement in 1984, 9.8 percent had to attain age 60 and meet a service requirement (usually 30 years), while 25.4 percent had to attain age 61 to 64 and meet a service requirement (usually less than 20 years). A full 55.9 percent of these members had their special retirement provision classified by Statistics Canada as "Other". This classification includes such hybrid provisions as the requirement that the member's age plus years of service equal 85 *or* that the member attain age 60 and complete 20 years of service. The requirement might also be age 62 and with 10 years of service *or* age 55 and 30 years of service.

No Subsidized Early or Special Retirement

To understand the role of early and special retirement provisions, consider first the benefit accruals in a plan which provides for early retirement only on an actuarially reduced basis (i.e., unsubsidized early retirement) and contains no special retirement provision. Pension benefits rise sharply with the member's age and years of service. If there is no inflation, the pension benefit rises in some plans from 12 percent of the member's wage at age 45, to 36 percent at age 65, if the member entered the plan at age 30. If the pension benefit is nominal, and if the inflation rate is 10 percent, the pension benefit in some plans rises from 1 percent of the member's wage at age 45 to 26 percent at age 65. The the pension benefit can rise as high as 90 percent at age 65 if the pension benefit is fully indexed and inflation is high.

The "back loading" of pension compensation is thus quite dramatic for the long–service employee when the inflation rate is high, a result due to large nominal wage increases received in such times. For a long–service employee, these increases enrich a large number of past service credits, producing a large benefit accrual. The "back loading" of pension compensation is attenuated somewhat if the member enters the plan at a later age, such as 45. Nonetheless, the "back loading" is still pronounced, especially if inflation is high.

In such a plan the member has a strong incentive to defer retirement until the normal retirement age of 65. The longer the plan member's service and the higher the inflation rate, the stronger is this incentive. There is no reason why a member of this plan, with unsubsidized early retirement and no special retirement, would wish to retire early on the basis of pension considerations.

Early and Special Retirement

Next consider a plan which contains a subsidized early retirement benefit and that allows for special retirement at age 62 with 20 years of service. The pension is reduced by 5 percent for each year that early retirement precedes the normal retirement age of 65.

The ratio of the pension benefit to cash wage no longer rises continuously with the member's age and years of service until the normal retirement age of 65. There are two spikes in the accrual of pension benefits by an early entrant, who joins the plan at age 30. The first is at the date of qualification for early retirement, and the second is the date of qualification for special retirement. For a late entrant joining the plan at age 45 there is only one spike in the accrual of benefits: the date of eligibility for early retirement, as the late entrant does not qualify for special retirement.

These benefit accrual paths affect work incentives. The pension compensation of the early entrant remains positive after this worker qualifies for early retirement. It turns negative

only after qualification for special retirement. Once the early entrant has qualified for an immediate and *unreduced* pension, the value of the pension payment foregone exceeds the value of the additional benefit earned on the basis of the additional year of service and the attendant wage increase. The late entrant, who does not qualify for special retirement, accrues positive pension benefits through the normal retirement age of 65.

If pension accruals are negative, there is a work *disincentive* contained in pension plan provisions. Based on pension considerations *alone*, the worker has an incentive to retire or to seek employment elsewhere. The worker is better off retiring from the original job and drawing the special retirement pension, if the worker can obtain the same cash wage elsewhere. The fact that many workers do retire just after qualifying for special retirement is not surprising.

Older female plan members on average have fewer years of pensionable service than their male counterparts. The greater subsidy for early retirement for males could help explain the observed divergence in participation rates.

Part-time work as Semi-Retirement

Part-time employment expanded rapidly over the 1976-86 decade. Of the 912,000 new jobs created in the province over the decade 265,000, or 29 percent, were part-time jobs. The share of part-time in total employment increased from 12.2 percent in 1976 to 15.5 percent by 1986.

The trend towards greater part-time employment is also reflected in the labour market status of older workers. In the 55 to 64 group, the share of part-time employment increased from 8.3 percent in 1976 to 12.4 percent by 1986, whereas for the 65 and over group it increased from 27 percent to over 36 percent over the same period.

A survey of retired people conducted for the Task Force observes that:

> Part-time work addresses many issues: it eases one gradually out of full-time work into retirement thereby avoiding the abrupt disruption of lifelong habits; it helps retain the sense of involvement and the association with comrades at work; it retains the stimulation and challenge and reinforces one's feeling of self worth. And it also helps financially with money for extras — theatres, vacations, etc., *relieving the feeling of alienation and in fulfilling the desire to achieve*. Employers may like to hire pensioners because they can pay them at lower rates, do not have the cost of payroll taxes and consider seniors to be more reliable than the young.

For the majority of seniors aged 66 and over, however, the largest single source of income remains Old Age Security (OAS) and the Guaranteed Income Supplement (GIS), according to a study conducted for the Task Force by Martine D. Gow-Cooper. In 1981 (OAS and GIS) provided 30 percent of the income of married couples where the husband was 66 and over, 32 percent of the money income of unattached men, and 43 percent of the income of unattached women. Investment was the second largest source of money income for all three groups, providing, in 1981, 28 percent of the income of elderly marred couples, 28 percent of the income of unattached men, and 31 percent of the income of unattached women. Earned income ranked third in importance for all groups aged 66 and over. In 1981, 57 percent of "families", aged 65 and over, had incomes under $15,000, and 74 percent of "unattached" individuals over 65 had incomes under $10,000. The average income for unattached women is reported as $8,000 per annum. From these data, it is apparent that the situation of Canadian seniors in 1981 was not rosy.

The Trend to Early Retirement

We have examined labour force participation rates in the province for older workers by age. For people 45-55 years of age, the increases in participation rates over the 1975-85 decade (the latest available data) are apparent. However, after age 57 negative signs are consistently recorded, indicating the decline in participation rates, which reflects the trend to early retirement over the past decade. The biggest changes are at ages 64 and 65, where double-digit participation rate declines are recorded over the decade, as far fewer people work past the traditional retirement age.

The dominant concern of employees in the province appears to be early rather than later retirement. Approximately 50 percent of all males and 80 percent of females are not in the

provincial labour force by age 64, a year before normal retirement age. Whether or not these trends will continue remains an open question. The introduction of the flexible retirement package in the C/QPP will increase opportunities to retire with pension entitlement after age 60. So the trend towards earlier retirement in these age groups may intensify. Increased longevity, however, may reverse this trend as males in the province aged to 60 now face 17.8 more years of life and females 22.7 years, much of it likely with good health. Canada shares with other more developed countries a pattern of steady declines in labour force participation rates by men in ages that are close to the model age of retirement. In these ages, 55–64 and 65–69, no similar declines are evident in labour force participation rates of women. In fact, the participation rate of women aged 55 to 64 increased from 1975 to 1980 and has remained stable up to 1985.

A less strong, though persistent, decline in the labour force participation rate has since the early 1970s been evident among men aged 70 and over. The rate for women aged 70 and over has remained at little more than 2 percent. It is worth noting that above age 70 the numerical predominance of women over men increases sharply. Thus one might argue that the debate over the effects of the abolition of mandatory retirement on decisions to work beyond the normal age of retirement has relevance primarily to those below age 70, at least under current institutional arrangements for industrial production.

Differences Among Jobs

The impact of abolishing mandatory retirement may vary considerably by occupation for a variety of reasons. First, the current age distribution of employment varies noticeably by occupation. Some occupations are "older" than others, and the impact of the abolition of mandatory retirement in these occupations can be expected to be quantitatively larger.

Second, the character of work varies by occupation. Some occupations are more suited to a younger person, while others may offer the older worker a comparative (if not an absolute) advantage. In the construction industry, for example, the abolition of mandatory retirement would likely have little impact since the predominant mode will be for earlier rather than later retirement. In teaching, on the other hand, the abolition of mandatory retirement would have a greater impact since employees are more likely to be able, and perhaps more inclined, to continue work beyond the normal retirement age of 65.

The Ontario Trucking Association, in a brief to the Task Force, argued that mandatory retirement at age 65 should not be banned for occupations where safety is a major consideration:

> Occupations in our industry for which we feel mandatory retirement should continue to be allowable are truck and/or tractor drivers and dock labourers. We believe this to be a reasonable position and a reasonable limit to the human rights legislation.
>
> In addition, we urge the Government of Ontario to press the federal government to allow mandatory retirement of these occupations at trucking companies that are federally regulated. In order to ensure high safety standards, a situation where carriers — based in Ontario but operating under different jurisdictions — abide by different retirement rules cannot be permitted to exist. Currently, trucking companies operating within Ontario are provincially regulated. Those operating out of or into Ontario are federally regulated.

A third possible occupational–specific impact concerns teamwork in occupations, such as firefighters and police, where the performance of some workers depends crucially on the performance of other team members. A "weak link" can affect the productivity or performance of the entire team. Where older workers are seen as less capable, there could be less tolerance by the organization and other workers for their continued employment. Occupations requiring teamwork — especially where safety is involved — might be more affected by the abolition of mandatory retirement than the average.

The abolition of mandatory retirement could lead to a more rapidly aging labour force if employees choose to remain on the job. "Dynamism" is often associated with youth. In such occupations as teaching and protection there may be legitimate social requirements for dynamism. If there is a direct relationship between the retirement of current employees and the opening of opportunities for youth in such

cases, mandatory retirement may be justified for these occupations. Although general criteria can be outlined, a case–by–case approach may be the only way to resolve this difficult issue.

Differences in Personal Circumstances

As pointed out to the Task Force by the National Council of Welfare:

> Almost all Canadian women get married, but very few can count on a man to provide for them for the rest of their lives. Even leaving aside the wives whose husbands have inadequate incomes, the vast majority of women are obliged at some point in their lives to take charge of their own economic needs ... According to this reconstruction of 100 women's lives, almost three out of every four women will find themselves on their own sometime in their adult lives. Although 94 of every 100 women marry, only 26 can expect to live with their husbands until death. Of the others, 15 will separate or divorce and 53 will become widows.

Private pension plans do not adequately recognize the role of women in a society that has changed drastically during the twentieth century. In 1975, 81 percent of unattached women over 65 had no private pensions at all. It is estimated on the basis of data collected by Health and Welfare Canada that the average income of all women 66 and over from private pensions (including miscellaneous superannuation income and annuities) was $370 in 1975. Of those who did receive private pensions the average amount was $1,976 per year. Such income is particularly vulnerable to the wasting effects of rising prices.

What are the causes of this situation? Only 27 percent of women in the labour force are enrolled in private pension plans. Most of these plans are operated by governments or Crown corporations. This means that only about 15 percent of women workers in the private sector are covered. The Canadian Labour Congress has estimated that only between 4 percent and 10 percent of members of private plans ever receive a full pension. Thus many elderly women, even if they worked most of their lives, are poor.

A further reason for this situation is that prior to the 1950s the majority of young women usually worked for a short period before marrying and settling down to raise families. Many pension plans excluded women on the ground that their attachment to the labour force was temporary and few would remain until they reached a pensionable age. Even as late as 1976, 308 plans out of 16,000 still covered only men.

Built–in discriminatory schemes often did not allow women to join a pension plan until an older age than men. They were also required to retire at a younger age: frequently at 60, compared to 65 for men. Women's pensions are often smaller in consequence because of the shorter periods of service.

In 1975 the earnings of full–time female workers were an average 60 percent those of full–time male workers. Women's pensions are consequently proportionately lower. In 1977, 22.6 percent of all women in the labour force worked part–time, with wages generally lower than those of full–time workers.

Possible Impact of the New CPP Provisions

Unlike social security in the United States, old age security (OAS) and Canada/Quebec Pension Plan (C/QPP) contain no "tax back" features to discourage work beyond normal retirement age. Thus it might be expected that the effects of the elimination of mandatory retirement on participation rates would be greater in Ontario than the United States because more American workers are involuntarily constrained by the taxation provisions.

Recent revisions to the CPP, which become effective in 1987 with the introduction of the flexible retirement package, contain a provision that the recipient must have "wholly or substantially ceased employment" in order to draw a pension between the ages of 60 and 64. In particular, the recipient must have employment earnings that are less than the maximum CPP benefit that is currently payable. With a current maximum of $521 per month, this limit corresponds to annual earnings of around $6,250. This is a one–time test applied at the time of application, when the applicant must provide an estimate of employment income for the coming year. In the event that the applicant subsequently becomes reemployed with earnings exceeding this limit, employers are informed that the employee is participating in the flexible retirement package and requested to

refrain from deducting CPP contributions at source. If contributions are still deducted at source they are subsequently refunded with the completion of the individual's tax return.

On balance, the recent revisions to the CPP would not appear to offer an incentive for most individuals to work part–time between ages 60 and 64. For full–time employees who attain age 65, the revised CPP provisions *do* facilitate part–time work. As before, the individual *could* elect to commence receiving a full CPP pension at age 65. This could serve, in part, to cushion or to eliminate any decline in earnings associated with moving from full–time to part–time work. In addition, the individual can now opt to dlay receipt of the CPP pension, with actuarial adjustment, if he or she elects to work part–time. If the individual has sufficient income that he or she does not require immediate receipt of the CPP pension, the postponement of its receipt may prove advantageous for tax reasons.

Views of the Currently Retired A Survey by Ruby Samlalsingh

The Task Force commissioned a survey of retired Ontario residents in Toronto to determine their views on the retirement decision. Though not performed on a scientific sampling basis, this survey in the Task Force's opinion reflects many of the concerns of those currently retired.

All groups interviewed responsed to the question, "What do you think about having to retire at age 65? post 65? before 65? or at any specified age?" unanimously and vociferously in the negative. All groups said that people should be allowed to stay in their jobs as long as they wished or were able to. Members of one group said that the principle of mandatory retirement was wrong: anything "mandatory" smacked of dictatorship and authoritarianism. Another group felt that it is discriminatory.

The argument that attaining age 65 necessarily renders a person's physical and mental powers less productive and reliable is a myth. If it were true, respondents asked, why does society allow judges, who have such serious responsibilities over people's lives and freedoms, to stay on until age 75? And what about senators? Is their work so much less demanding and responsible that they can be allowed to continue performing well beyond the age when the average person is required to give up his or her job?

To substantiate the claim that there is life and creative energy past age 65, reference was made to several people who have contributed significantly in politics, the arts, and in service to their fellows well beyond normal retirement age. Such creativity is forced to go to waste by arbitrary rules about retirement age. The only suggestion that occasionally caused the groups to waver in their condemnation of mandatory retirement was the possibility that abolition might increase youth unemployment or act as a barrier to their orderly progression through the ranks. Such wavering was soon overcome; group members insisted there was no proof that unemployment would increase significantly: the number of workers attaining age 65 in any one year is far less than the number of entrants to the labour force. There is no evidence, furthermore, that a retired employee is replaced, directly or indirectly, by a young person who would otherwise have been unemployed. Youth unemployment has more to do with changing educational and skill requirements than with a 65 year old retaining the job in which he or she has worked for 20 or more years. As for the hope of orderly progression through the ranks, it is illusory as the position ahead of one often is filled from outside the organization.

The consensus was against the principle of compulsion implied in mandatory retirement, but all groups conceded that many do not wish to work beyond 65. Many people feel they have done their share and are happy to retire at 59 or 60, or even earlier. Many, also, are content to retire in order to try something new, on their own, or with a different employer, and even a different kind of work. All agreed, however, that it depends on the nature of the work they were doing. Some occupations wear one out by 55; others keep developing one mentally and physically. A coal miner's job is difficult but there are also many white collar workers so

---

For further reference: Ruby Samlalsing, *An Opionion Survey of Seniors on the Issue of Mandatory Retirement,* a report commissioned by the Task Force.

bored by their work that they want to quit as early as possible. One interviewee speculated that 75 percent of the population are not doing work they truly love: people stay on because they need the money and they are happy, on retirement, to take their pension and go, but not necessarily to do nothing.

How to Cope with Retirement

What is the most difficult thing to cope with on mandatory retirement? The drop in income? The loss of a feeling of self worth? A sense of guilt about not contributing to society? The absence of the feeling of achievement? The loss of the camaraderie of the work place?

Responses to this question were less unanimous. For some, the most difficult thing to cope with is the loss of income, because "you can't do much without money". This is especially difficult where a person has to give up a home and household possessions to move into a one bedroom apartment or bachelor suite. One group in particular, whose members live in senior citizens' buildings with rents subsidized by Metro, agreed that entering the new environment and parting with their household possessions was traumatic. Yet as far as money was concerned, one exceptional woman in this group said she is quite well off because her pension keeps increasing. She qualified her remark by saying she had never been a big spender.

In response to the question, "If total income remained the same, would you mind that you had to retire?", most groups said that men feel "loss of face", depression, rejection and suffer from lack of stimulation. One man expressed the opinion that "nothing compensates for working". The women do not seem to suffer these socio–psychological problems to the same degree, although some resented the arbitrariness and lack of preparation for mandatory retirement.

There appears to be no great feeling of guilt among retired people about not contributing to society. But there does seem to be a pervasive yearning to be involved and a sense that the feeling of self worth has been lost. People miss the satisfaction and achievement they experienced from working and long for opportunities to be challenged and to prove their capability. People seem to miss most the discipline and structured time of the work place and the camaraderie with fellow workers, a loss which could prove traumatic. Other intangibles lost include the pride and respect being a working person elicits from neighbours, acquaintances, friends and family.

The sudden and abrupt change from full–time work to total retirement aggravates socio–psychological problems associated with retirement. It upsets the biological clock, according to one respondent. Physical and mental health deteriorates. At age 65 or thereabouts, "seniors know" they are on the way out. The world is closing in on them — they need all the psychological support available to hold at bay depressing thoughts about "the end". With mandatory retirement coinciding with this phase of life, forcing a break with routine and the companionship at the work place, people have nothing to focus on but themselves and their mortality.

This led to the conclusion supported by all groups that retirement at whatever age, whether mandatory or at the employee's or union's option, should be a gradual process. This could be achieved by reducing either the hours per day or the days per week; by increasing vacation; by greater use of study leave and furloughs.

Some participants suggested that the employer has to think about productivity and the bottom line. Others countered that personal matters were an administrative detail which should not be beyond the capability of a society which launches satellites into space.

All groups agreed that retirement counselling should be offered everyone a few years before retirement date so that they could start planning for it by developing hobbies, if they do not already have any, or new non–work related interests.

Is it easier for blue collar workers to accept retirement than white collar and professional workers? Opinion differed considerably. One group felt that manual workers are still fit at age 65 and capable of working while many white collar workers are bored with their jobs. The

only consensus was that it depended on the occupation and the individual.

Part–time Employment

To the question whether part–time employment would help resolve the socio–psychological problems associated with retirement, the response was almost unanimously in the affirmative. Part–time work eases one out of full–time work into retirement avoiding the abrupt disruption of lifelong habits; it retains the sense of involvement and association with comrades at work, the stimulation and challenge, and reinforces the feeling of self worth. It helps financially with money for extras — theatres, vacations, etc. All groups agreed on the advantages of part–time work in relieving alienation and in fulfilling the desire to achieve, but they conceded that not everybody had such need. One person suggested that employers like to hire pensioners because they can pay them lower rates, do not have the expense of payroll taxes, and consider seniors more reliable than the young.

Conflicts Between Seniors and the Working Population

To a question about potential conflict between seniors and the working population, most groups replied that they were not conscious of any. On reflection, some remembered reading articles about the burden of a smaller working population supporting an increasing senior population. The defeat by "grey power" of the federal proposal to de–index pensions may have sharpened sensibilities on both sides, but respondents maintained that if conflict exists, it is covert and not evident on a personal level. Some felt that part–time work could help defuse any conflict; on the other hand, there could be tension from the perception that seniors may be taking jobs needed by the young.

Asked if women who have never worked outside the home have similar socio–psychological reactions when their families grow up and leave, most people thought not: women are proud to have raised good citizens and there are always the grandchildren.

Asked whether there is a feeling of having been rejected by society, all groups responded in the negative. As a growing proportion of the population, seniors have more clout; society does a lot for them in health care and other social services. Nevertheless, housing falls far short of what is desirable and possible. Although the care of seniors has come a long way over the past thirty years, society must prepare to do more because people are living longer.

Some respondents expressed great concern for retired people who did not belong to a seniors' club. One referred to them as "lost souls" with nothing to do and no interest in anything. While their material needs may be adequately met, they seem isolated and alienated. Others suggested that social workers should increasingly help such "lost souls" find a more satisfying retirement by involving them more in social activities.

Asked how seniors satisfied their need for a sense of achievement, most respondents remarked that membership in seniors' clubs was a great arena in which to strive and achieve. Hobbies, handicrafts and voluntary work pose great challenges that can stretch one's capabilities. The companionship and sociability made possible by active membership greatly relieve some of the socio–psychological problems of retirement and provide opportunities for a satisfying life.

Asked if they thought society demanded higher standards of seniors than it does of the general population, such as the requirement for annual driving tests after age 80, all clubs said they had not noticed it. Everyone thought the annual driving test an excellent thing for the protection of the individual and the public.

In the event that mandatory retirement at age 65 were abolished, it was agreed that changes would be needed in traditional working conditions and personnel practices.

Periodic evaluations would be necessary to ensure the employee's performance remains at the level of competence required by the position. Respondents hesitated, however, when asked what an employee's attitude might be about accepting a position with less responsibility and lower compensation if he/she fell short of performance criteria. Respondents generally believed it would be very difficult to accept

because such a move could seem a demotion in the eyes of fellow workers. Other considerations would have to be cast in the balance. If the employee needed the money, or feared the lack of involvement, or dreaded the alienation of retirement, he/she might reluctantly accept the altered status.

While the idea of performance evaluations is resisted, there seems to be no problem accepting regular medical examinations.

In the event that mandatory retirement were abolished, there was considerable consensus among the interviewees that the following employment provisions should be put in place:

- longer periods of sick leave beyond a certain age to enable an older worker to retain his/her job despite possibly increasing bouts of ill health;
- more frequent medicals;
- shorter work day or work week past a certain age;
- longer vacation periods past a certain age.

Asked what opportunities exist for retired people to enjoy a satisfying lifestyle, most felt that there were lots of interesting things to do offering both stimulation and enjoyment, in their clubs and in society at large. They mentioned things like Living and Learning courses in universities, adult classes, handicrafts, club entertainments, family and friends. Respondents expressed sympathy, however, for the large numbers of seniors who do not participate.

Distinguish Between Issues Of Retirement And Old Age: Dr. Alan Roadburg

Dr. Alan Roadburg's brief to the Task Force presented a number of helpful perspectives concerning the retirement decision. First and foremost, it is critical to distinguish between the issues surrounding retirement and those of old age. The two are often confused, which is harmful and wrong. When we speak of older or senior workers we are talking about people in their 50s or 60s. Are any workers in this age category less efficient or more accident prone than when they were 30 or 40? Advances in medical science, health care, and automation at work necessitate advances in our thinking about the capabilities of so called older workers.

The question of whether or not mandatory retirement protects workers and the public from accidents caused by the aging process should not even be considered. For example, there is no evidence that older workers are more accident prone on the job. In any event, job–related accidents are diminishing with the proliferation of service and administrative jobs and the introduction of labour–saving devices.

One of the main arguments for maintaining mandatory retirement is that abolition will necessitate job evaluations which will give management an opportunity to dismiss older workers. Though this practice may be abused, should we assume that older workers are more likely to fail a job evaluation test? U.S. Bureau of Labour Statistics research has consistently challenged the belief that older workers are less efficient or consistent than their younger colleagues or that their absenteeism rates are higher. Not only are older workers more likely to remain on the job, but also they are less likely to incur job–related injuries. Whatever technical skills they lack may be fully compensated for by dependability, consistency or loyalty, traits that in themselves make retention of these employees worthwhile. If evaluation were necessary to keeping a job, it would surely have to apply to workers of all ages. It does not necessarily follow that older workers would fare poorly compared to their younger counterparts. The problem here is the assumption that all older workers are similar, which they are not, and of ascribing poor job performance to a group of workers based on age.

Suppose an older worker is not efficient on the job. Rather than assuming this is due to age, we should look at why this may be so. There can be a number of reasons that have nothing to do with age. There's the nature of the work. Could inefficiency be a function of boredom after thirty odd years of the same repetitive task? Could an older worker be afraid of retirement and all its implications? Could this apparent inefficiency be due to depression from knowing that one will have difficulty supplementing a meager pension? Could it be fear of a future without challenges or

having a place to go everyday? Most older workers realize they will have problems finding other employment, and that often they are exploited, paid lower wages or offered jobs younger people do not want.

To put this in a different perspective, it may be instructive to ask yourself the following question: when you retire, what do you think you will miss most by not working? People often mention mixing with others, money, some place to go everyday, routine, challenge, power, and feeling useful. If you were about to retire and were concerned about losing all of these goodies, don't you think your job efficiency would suffer?

The main point is this: even if we dismiss the question of efficiency or safety based on age, there are many solid arguments for or against mandatory retirement. An effective policy must satisfy employees, employers and labour groups. The ultimate goal presumably is a policy that will enable people to retire with "dignity" that does not cause too many problems for employers or society. How can this be achieved?

From the point of view of employees and labour groups, retiring with dignity means retiring if and when one wants to retire. For management, it means not having to carry less efficient high wage earners. This can be reconciled in most cases if three conditions are met. First, the individual must have an adequate retirement income; second, he or she must have worthwhile retirement interests; and third, society must accept retirement as a legitimate role in life. Unfortunately, the latter two consideratons are ignored in most discussions on this issue, especially in the mandatory retirement debate and when organizations are attempting to influence early retirement.

In Dr. Roadburg's research on life satisfaction among retirees, he found that approximately 40 percent expressed some degree of dissatisfaction with retirement. The main reason wasn't health or money. It was boredom. Only 1 percent mentioned not having enough money as a reason for dissatisfaction. The same ratio holds true from his experience in running retirement education workshops. Approximately 50 percent of pre–retirees do not have any alternatives to look forward to when they retire.

Dr. Roadburg concluded that if people have an adequate income, worthwhile alternatives, and if retirement is not looked down on by society or the individual, most people would continue to work efficiently and be happy to retire with dignity when eligible for a pension, whether or not a mandatory retirement policy is in place. If not, it is because one of these three conditions is not being met.

5

Impact of Mandatory Retirement on Unjust Dismissal Legislation

Introduction

This discussion examines the likelihood of an increase in disputes concerning unjust dismissal of employees who would have otherwise left the workforce because of mandatory retirement but who choose to continue to work. Agains this backdrop we then proceed to a brief examination of the case for utilizing another mechanism — beyond those already existing —for resolving these disputes assuming that another mechanism is justified.

Assumptions about the Nature of Reform to Abolish Mandatory Retirement

For the purposes of discussing ramifications of abolition of mandatory retirement, we have assumed that the legislative reform would involve the removal of the upper age limit of sixty–five years in the definition of age in s.9(a) of the *Ontario Human Rights Code* for the purposes of the employment discrimination prohibition in s.4(1). It is also assumed that the *bona fide* occupational qualification (B.F.O.Q.) exemption, found in s.23(1)(b) of the *Ontario Human Rights Code* and virtually all age discrimination legislation in the United States and Canada, will continue.

This assumption is identified at the outset because different types of reform, some of which have been implemented in other jurisdictions, may alter significantly the potential for the detrimental effects of abolition that have been identified. For example, the *New Brunswick Human Rights Act* contains a very broad exemption to the age discrimination prohibition for "the termination of employment or refusal to employ because of the terms and conditions of any *bona fide* retirement or pension plan." Employers, or employers and unions by means of collective agreements, are free to set fixed retirement dates in New Brunswick as long as the fixed retirement date is a term of a *bona fide* pension plan. However, if an employee who reaches the fixed retirement date is ineligible to participate in the plan due to lack of required years of service, the exemption in s.3(6)(a) would appear to be inapplicable. If one accepts the finding by Gunderson of a strong correlation between the existence of collective agreements, pension plans and mandatory retirement, such a broad exemption for pension plans would likely mean that mandatory retirement would continue in the collective bargaining context.

The U.S. *Age Discrimination in Employment Act* also contains special exemptions, in addition to the B.F.O.Q. exemption, to alleviate concerns about the implications of the abolition of mandatory retirement for several specified occupational groups. These exemptions are for:

1. employees who are 65 years of age or older, who for a two year period immediately before retirement were employed in a *bona fide* executive or high policymaking position with the employer, if the employees are entitled to an aggregate annual retirement benefit of at least $44,000.

2. tenured professors at institutions of higher education who are 70 years of age or older. (This exemption has a sunset clause requiring repeal on December 31, 1993. The legislation also requires the EEOC to conduct a study of the implications of the elimination of mandatory retirement on institutions of higher learning).

3. firefighters or law enforcement officers who are refused employment or terminated pursuant to a *bona fide* hiring or retirement plan.

The first two exemptions have been in place since the major amendment of the ADEA in 1978 to raise the upper limit for age discrimination to 70 years of age and have been continued, subject to minor amendments, with the general removal of the upper age limit effective January 1, 1987. The third exemption was recently enacted by P.L. 99–592 (in force January 1, 1987) and was a direct reaction to a

For further reference: William A. Bogart and Brian Etherington, *Some Implications Concerning Employer–Employee Relations Should Mandatory Retirement be Abolished*a report commissioned by the Task Force.

U.S. Supreme Court ruling that a mandatory retirement age of 55 for Baltimore firefighters was not a B.F.O.Q. Congress was apparently of the opinion that the Court had created too narrow a construction of the B.F.O.Q. exemption in the context of these two occupations.

The Likelihood of Increased Incidence of Unjust Dismissal Claims in Grievance Arbitration or at Common Law

There appears to be a dearth of evidence supporting the contentions of those who claim that the legislative elimination of mandatory retirement could have substantial implications for the incidence of unjust dismissal claims and related personal management functions. We have some empirical data concerning the number of persons in the labour force subject to mandatory retirement (approximately 50%) and the number of persons affected by mandatory retirement who are likely to continue working past their normal retirement age if allowed (estimates vary from .01 to .03 of the total workforce) but precious little evidence concerning the actual impact of abolition on personnel policies.

Of the studies which have been done in jurisdictions where mandatory retirement has been abolished or the age cap for discrimination claims has been raised (i.e. United States, Manitoba, New Brunswick and Quebec), the general perception seems to be that there have not been dramatic effects on personnel policies. Despite predictions made by labour economists in the United States and Canada that abolition would mean increases in terminations for cause and performance monitoring and appraisal systems, and changes in seniority practices, these concerns have not been borne out in actual practice, at least in the short term, by studies in either the United States or Canada. In particular, the Warrian and Prevision Prospective Inc. reports prepared for the Task Force indicated that there had been no significant effects in terms of the number of workers who stayed on, the incidence of dismissals for cause, use of performance appraisal systems, or use of the seniority principle as a consequence of the abolition of mandatory retirement in New Brunswick, Manitoba and Quebec.

A separate point concerns the impact of mandatory retirement's elimination over an extended period of time. In the long term, drastic changes to work habits are possible which might result in many more senior employees deciding to continue to work past what would have been the mandatory time of retirement. Such changes might occur for any number of reasons including: first, many people now may have made their plans around the existing constraint of mandatory retirement and they may not be able to change those plans easily simply because the constraint is removed; second, retirement plans can depend upon others and as their plans change it may influence others to change too; third, blue collar workers make the greatest demand for early retirement and as more of the population moves into white–collar work this might produce a counter–demand to be allowed to work longer; fourth, should abolition of mandatory retirement reduce the pressure to provide for retirement income this might compel some employees to continue working. Finally, a sustained downward trend in the economy might pressure people to continue to work longer.

Part One

Introduction

We would expect that the experience of other jurisdictions that have banned mandatory retirement will repeat itself in Ontario. In particular, we do not believe that a ban would cause an undue burden of claims for unjust dismissal. We conclude that in the short run this will not occur because of the few employees likely electing to continue to work after the present retirement age. However, adopting a worst case scenario we will proceed to assume a substantial increase in such claims and examine a number of models for dealing with such an increase but underscore the case for analyzing these in a broader context of employer–employee relations.

Present Methods Available for Claims for Unjust Dismissal

At present there are four main ways in which a claim for redress for dismissal can be asserted in Ontario and they will be briefly sketched since they are the background for much of the analysis which follows. All of these mechanisms have strengths and weaknesses which are highlighted. The difficulty is finding a better solution particularly if it is focussed only on claims for wrongful discharge involving employees who would have had to retire but for the abolition of mandatory retirement (to whom we will refer to on occasion as "senior" employees).

Civil actions for unjust dismissal

An employee who believes he has been dismissed without justification may sue in the civil courts to claim damages. The action revolves around whether the employer did not have justifiable grounds for the dismissal in which case damages are payable or if the employer did not have justifiable grounds whether he gave adequate notice or monetary compensation in lieu of such notice. Because justification is difficult to establish, absent such clear reasons as gross incompetence, theft or conflict of interest, many, if not most, such lawsuits revolve around the question of how much compensation in lieu of notice the employee is entitled to. Less frequently damages for mental distress may be awarded if the circumstances of the discharge have been high handed or obviously insensitive. While some cases suggest reinstatement may be a remedy this is very rarely done.

Although we are not aware of any studies on this point, the difficulty with civil actions for unjust dismissal, as with civil litigation generally, are that they are likely to be more expensive and protracted than the other proceedings described in this section. Thus, in practice, and however satisfactory they are in any event, civil actions are most likely to be used by more senior and better remunerated managers and executives who have, comparatively, more resources and who are often better acquainted with lawyers and the judicial system.

Claims under the *Employment Standards Act*

The *Employment Standards Act* provides minimum notice requirements for employees based on the length of time that they have been employed if discharged without cause. An employee who has been employed for at least three months is entitled to one week's notice in writing if he has been employed for less than two years, two weeks' notice in writing if he has been employed between two and five years, four weeks' notice in writing if he has been employed between five and ten years and eight weeks' notice in writing if he has been employed for more than ten years.

The Act contains an enforcement mechanism which allows an Employment standards officer appointed under the Act to order payment of wages owing to employees. An officer's order is reviewable, under certain conditions, by a referee appointed under the Act. However the stipulated periods of notice are so minimal that such a "remedy", even when enforced by employment standards officers, allows for little redress. Moreover, these required notice periods under the *Employment Standards Act* are minimum only and the courts in wrongful discharge actions very frequently award payments based on much greater periods of notice.

Arbitration under collective agreements

Arbitration is the statutorily stipulated mechanism for resolution of disputes concerning collective agreements, including a claim for unjustified dismissal. Arbitration is usually preceded by grievance procedures but their effectiveness in resolving disputes has been questioned. An arbitrator has broad remedial powers including the ability to reinstate an employee whom she finds has been unjustifiably dismissed. But, unless the collective agreement specifically stipulates to the contrary, there is no power in the employer to discharge an employee by giving notice or damages in their place, though there may be a limited power in the arbitrator to award damages instead of reinstatement where the latter is inappropriate.

Unlike civil cases, the discharged party does not, subject to exception, have control of the arbitration concerning the firing. This is because the parties to the collective agreement are the employer and the union and not individual employees. So the union, subject to conditions like the duty of fair representation may, without the consent of the employee, appoint a member to a board of arbitration, settle the grievance or continue the matter and present it as it believes to be in the union's best interest.

While arbitration is the prevalent mode of dispute resolution for a spectrum of claims under a collective agreement, it has fallen short of expectations as a model of resolving disputes which is always flexible, fast, and inexpensive. The time it currently takes to restore grievances frequently leaves the parties dissastisfied, confused and frustrated regardless of whether they win or lose the case.

This is not to doubt the efficacy of arbitration. It is to emphasize the difficulty of designing, implementing and maintaining any form of dispute resolution which will both achieve fairness to all concerned and be accessible.

Proceedings under the Ontario Human Rights Code

An employee who believes she has been dismissed because of some form of prohibited discrimination may file a complaint with the Ontario Human Rights Commission which, in this context, may investigate discrimination in employment on specific grounds (e.g. race, sex, colour, age — defined as more than eighteen and less than 65) which is prohibited subject to *bona fide* occupational requirements. The Commission may investigate the complaint and it may either refuse to deal with it on the grounds that it is frivolous, vexatious or made in bad faith or it may investigate it and attempt to settle the complaint through conciliation. If a settlement is not reached then the Commission can ask the Minister of Labour to appoint a Board of Inquiry (often a law professor) to conduct a hearing with the Commission usually conducting the case on behalf of the complainant. The Board of Inquiry has broad remedial powers should it find the complaint well–founded — damages, orders to change employment practices or to post notices in the workplace, and reinstatement. Some idea of the work of the Commission concerning the present basis for age discrimination (18 to 65) in employment can be gleaned from its statistics. In 1986–87 the Commission investigated and attempted conciliation where appropriate in 1342 complaints concerning discrimination in employment (these figures do not include any boards of inquiry ultimately appointed). Of these 189 involved age discrimination of which 60 were in respect of recruitment and hiring, 104 in respect of termination, and 25 in respect of situations during employment. Of these 189 complaints, 104 were settled, 58 were dismissed or not pursued and 27 were withdrawn.

The process was founded upon a philosophy of conciliation and accommodation and statistics appear to suggest that most complaints are resolved in this way. For example, in 1986–87, 1647 complaint files were closed (these include the 1342 cases described above) through investigation and conciliation by the Commission but only 70 boards of inquiry, where a formal hearing would be held were appointed in that year. On the other hand a complainant does lose some control of the process since the investigation and conciliation procedures are largely controlled by the Commission and the Commission can refuse to deal with a complaint past the investigation–conciliation stage. It did this in 14 to 29 percent of the cases between 1982 and 1987. Further it has been alleged that there can be up to two years between a complaint and a board of inquiry, a particularly long time, if it is the case, when an employer is faced with a possible order for reinstatement of the discharged employee.

The Possibility of an Increase in Claims for Unjust Dismissal

As discussed earlier all studies of which we are aware indicate that in the jurisdictions which have abolished mandatory retirement in whole or in part, only a small percentage of those who are eligible to continue to work past what would have been the mandatory retirement age (usually 65) elect to do so and that, in fact, these studies

are consistent with other data which indicates that the more dominant trend is towards earlier retirement.

It may be that certain groups might choose to exercise these rights in disproportionate numbers. For example, there is some evidence to suggest that in Manitoba, and less clearly in Quebec, university professors have elected to continue to work beyond what would have been the retirement age in response to the abolition of mandatory retirement and the proportion staying appears to be increasing. Nevertheless, there would have to be many of these "pockets" exercising their rights to continue and doing so in significant numbers before any substantial increase in claims could arise.

The only statistics which we have been able to uncover which would in anyway suggest that abolition or modification of mandatory retirement has caused a substantial increase in workload for any mechanism involved in resolving disputes between employers and employees is an indication of a substantial increase in complaints under the United States Age Discrimination in Employment Act (ADEA) around the early eighties after enforcement of that Act was transferred from the United States Department of Labour to the Equal Employment Opportunity Commission (EEOC) and the general age for retirement was raised from 65 to 70. It is unclear what caused the increase but the EEOC suggested it might have been because of the transfer of enforcement authority and a resulting public "heightened awareness" of available procedures. Moreover, since a claim for wrongful discharge is extremely difficult to establish in the United States, a discharged employee, not under the protection of a collective agreement, within the applicable age range might use the ADEA–EEOC procedures as the only means of redress. In any event we have not discovered any material which suggests that the E.E.O.C. was unable to process this enlarged number of complaints.

Thus the burden of the statistics available suggests that the abolition of mandatory retirement would add only a small trickle to the pool of claims for unjust dismissal. Moreover, discussion of apprehensions that abolition of mandatory retirement will result in an increase in proceedings attempting to enforce the right to work beyond what would have been the retirement age and that this increase will burden the courts or other decision makers can be usefully put in a larger context. There are any number of instances where the spectre of "floodgates" has been raised in opposition to change in many areas of substantive or procedural law and yet the charge has proved without foundation. Thus, for example, when *Donoghue* v. *Stevenson*, the case which altered the face of tort law was argued the spectre of multitudes of similar cases overwhelming courts was paraded out but no such problems have occurred. Opponents of class actions suggested their coming would swamp the courts, yet this has not happened in the United States where a liberalized class action procedure has been available for about twenty years. Similarly, opponents of broadening the rules concerning standing to initiate litigation (change designed to allow more "public interest" issues to be resolved by the courts) have predicted an avalanche of actions in the face of such change. But thoughtful commentators reviewing the available evidence reject such allegations.

Moreover, even if it were clear that claims concerning unjust dismissal for senior employees would add to the burden of the courts that would not be a reason in itself for disqualifying these claims. The workload of courts is not static but changes as new kinds of claims are recognized and other rights are extinquished or removed from the courts' jurisdiction. The coming of the Charter has added a whole array of issues with which the courts must grapple. On the other hand, motor vehicle actions' days in court may be coming to an end. There is thus no reason to shrink from adding new claims simply because they are new.

We are here not attempting to argue that concerns about the impact of abolition of mandatory retirement on employer–employee relations and dismissals of employees and claims arising out of these dismissals are not legitimate. But any suggestions that burdensome problems will inevitably result need to be viewed critically in light of the data available and the larger context regarding such apprehensions towards any change.

However, a separate point concerns the impact over an extended period of time. In the long term, drastic changes to work habits are possible which might result in many more senior employees deciding to continue to work past what would have been the mandatory time of retirement. But, even if such changes were to occur and produce large number of older employees continuing to work, such changes would not take place suddenly but only over the long term. Thus there would be time (and warning) to make any necessary adjustments to the various means of resolving claims for unjust dismissal.

Thus in the short term, there does not seem to be grounds for concern about a substantial increase of claims for wrongful discharge because the available data indicates few people would exercise the option to continue working. However, discussion of claims by senior employees who believe they have been dismissed because of their age may illustrate some of the larger problems concerning employer–employee relationships and termination of that relationship which may need to be addressed generally.

Possible New Approaches to Resolution of Claims for Unjust Dismissal

Problems with Present Methods

Because abolition of mandatory retirement is, at least in the short run, unlikely to give rise to any substantial number of claims there seems to be no basis for suggesting that a specially designed dispute resolution mechanism needs to be implemented. Moreover, based on the experience in jurisdictions which have abolished mandatory retirement, it is not clear what other problems (besides the numbers issue which seems to have little foundation) the specially designed mechanisms should be addressing in this context alone.

However, focussing upon the possible consequences of the abolition of mandatory retirement on claims for wrongful dismissal does highlight the arguable shortcomings and overlap in the way any claim for unjust discharge is addressed at present. So considerations concerning the resolution of claims by employees who would otherwise have left the work force because of mandatory retirement (sometimes referred to as "senior" employees) could feed considerations revolving around the design of a more generally applicable mechanism. The following are some prominent examples:

Overlap between the Ontario Human Rights Commission and arbitration and the Ontario Human Rights Commission and civil actions

Under the present law it is possible for a claim involving an allegation of some form of discrimination (in our case age) to be brought either as a complaint before the Ontario Human Rights Commission or arbitration (if the employee is under a collective agreement) or in a civil action (if the employee is unorganized). This is so because the dismissal of an older worker could be objected to as one without cause, thus giving rise to arbitration or a civil suit, as the case may be, or could be objected to directly as an act of discrimination based on age thus providing the basis for proceedings before the Ontario Human Rights Commission. Although our immediate concern is age it will be appreciated that similar situations could arise with other forms of discrimination: sex, colour, creed, etc.

Allowing the complaint two potential means for raising the same issues could result in waste of resources, delay in the ultimate disposition and, potentially, contradictory outcomes. It is not suggested that these problems have plagued these proceedings so that they are unworkable or that the different methods have not attempted some resolution of the problems by utilizing such devices as election and waiver, exhaustion and *res judicata*. However, the problems can be sufficiently serious in specific cases and the appropriate solution sufficiently unclear they could be profitably addressed in a larger study on claims involving unjust dismissal.

Remedial inflexibility for court actions

Commentators have argued that a significant shortcoming with civil actions for unjust dismissal is the courts' refusal to grant reinstatement as a remedy. This failure on the part of the courts was a principal reason for the Federal government enacting s.61.5 of the Canada Labour Code and variants in Quebec and Nova

Scotia. The Code provides a statutorily authorized form of arbitration by an "adjudicator" for non–unionized employees in the federal jurisdiction. The arbitrator, if she concludes that the employee has been wrongfully dismissed, has broad remedial powers including the right to order reinstatement. Thus, non–organized workers in the federal sector enjoy similar protection against unjust discharge as enjoyed by most workers under collective agreements.

This is not to suggest that there could not be a number of difficult issues concerning the details of such reform. For example, there could be a sensitive policy decision regarding the scope. "Managers" were excluded from that part of the Federal legislation on the grounds that they would be able to sue in court in order to recover damages for wrongful dismissal unlike less well paid "employees". They were excluded because the purpose of the reforms was to put unorganized employees in the same position as organized employees regarding discharge and managers, should not be included because they cannot bargain collectively under the Code. Reinstatement as a remedy was not appropriate since it would diminish managers' effectiveness towards subordinates and peers and managerial positions could be obtained in other places. Yet these rationales for narrowing the scope have been strongly criticized. For instance, it is said that blanket denial of reinstatement to managers is too inflexible since, as with non–managerial employees, its appropriateness will depend on the circumstances. Moreover, it is not clear that managerial jobs are so abundant particularly in the case of older men and women. So the argument is that "managers" should be covered by the *Code* and that reinstatement and the meaning of cause be subject to adjudicators' discretion just as in the case, at present, of workers who are not managers. The point here is not to resolve this issue but only to illustrate that any change in employer–employee law is likely to involve a number of questions with potential for substantial ramifications which will have to be carefully assessed.

Lack of access for some employees

This paper is to examine whether abolition of mandatory retirement would result in claims that would burden dispute resolution mechanisms. As discussed this is unlikely to occur. However discussing claims for unjust dismissal by the senior worker brings to the surface a more general problem. Far from lodging too many complaints or engaging in litigation which is ill–founded, many workers may have little or no access to a means of resolving their claim for being unjustly dismissed. Organized workers have the possibility of grievance and arbitration, in most instances, carried forward by the union. Higher paid employees are often accustomed to taking and receiving legal advice and so can consult with lawyers and have them assist in negotiating a claim arising out of a dismissal and, if need be, can launch civil proceedings for damages based on the alleged unjust dismissal. This is not to argue that such litigation cannot be protracted and expensive but to suggest that higher paid senior employees are more likely to have the means and sophistication to at least engage the court system in order to assert a claim.

By contrast lower paid non–executives or non–managerial employees who are not organized may have little means of redress in practice. There are no studies, of which we are aware, which specifically document lower level employees' hesitancy to use the legal system to assert a claim for unjust dismissal. However, there are many studies and reports which document the expense and stress of litigation and the reluctance of ordinary people to litigate both because of the expense of lawsuits and their fears and inhibitions concerning the legal system. The substantial majority of reported court cases appear to involve more senior employees and executives and conversations with lawyers handling claims for unjust dismissal indicate that the bulk of practice involves men and women towards the higher end of the salary scale.

Thus, section 61.5 of the Canada Labour Code and its variants in Quebec and Nova Scotia,

described in the preceding section, appear to be designed not only to confer a claim to job security on organized employees by authorizing the remedy of reinstatement but to provide a forum for asserting claims concerning unjust dismissal for employees who might effectively be unable to or be inhibited from using the courts.

The entitlements concerning notice or wages in place of them stipulated by section 40 of the *Employment Standards Act*, and enforceable by the provisions in that Act are available. But these are very minimal provisions and so, even when enforced, they provide little redress for the employees who most need them, those who are lower paid and who are likely to take no other actions to protest their discharge.

Investigation of present methods

In our view, there seems to be no foundation for suggesting that abolition of mandatory retirement would result in a pressing need to alter the way disputes are resolved. In the long term, however, it may be that the impact of mandatory retirement might produce substantially more older employees and thus more disputes and issues particular to unjust dismissal claims involving senior employees. At that point and prior to advocating any alternative system we will urge that a careful empirical study be conducted which would examine the profile of users, method of dispersion, success rate, costs, remedy granted, user satisfaction of claims involving senior employees as compared with claims by older employees.

This suggestion is not to deter reform. Rather it is to suggest that resources for changing the law and devising new procedures should be done in a way to spend those dollars where the need is greatest. It is now fashionable to speak in terms of "Alternative Dispute Resolution Mechanisms" (ADRM) as devices which will give greater access, speed, flexibility and which will be cheaper than established modes by which is meant mainly courts but sometimes administrative procedures. Thus experiments, proposed or implemented, with such procedures as "mini"–trials, "rent–a–judge", arbitration and mediation, neighbourhood justice centres, medical malpractice screening panels and court–annexed arbitration are receiving a great deal of attention as potential mechanisms for improving the administration of justice. However, it is not clear (sometimes because of an absence of good evaluative studies) whether such alternatives always match expectations and, as mentioned below, they have been charged with imposing an inferior method of dispute resolution upon those not sufficiently endowed to use the traditional methods. This is not to in any way speak against experimentation. It is to argue in favour of careful innovation so that dollars spent for the administration of justice are spent most effectively.

If there were a disposition independent of any recommendations made by the Task Force to change the law of employer–employee relations generally the potential problems of older workers being discharged might be an additional justification for reform. For example, if it were otherwise decided to move in the direction of arbitration for discharged employees who are unorganized in the expectation that it will be more accessible, faster and allow for greater job security by authorizing the decision–maker to order reinstatement, then claims arising out of discharge of senior employees might inform such decisions.

In that broader context policy makers, for example, might consider enacting some variant of section 61.5 of the Canadian Labour Code, (the rationale for which was described earlier and procedures for which will be described later). But, again, there would be many policy issues which would have to be carefully considered. For example, as referred to earlier, should it apply to all unorganized employees or is the case for excluding "managers" compelling? How long should an employee have had to work before being able to invoke the procedures? Should the discharged employee be subject to some screening procedure, such as appropriate ministry approval, or should he be entitled to go directly to adjudication? Should the adjudicator be empowered to find the dismissal unjust in the face of redundancy? Should the procedure be the exclusive method or should a civil action and other procedures such as the Ontario Human Rights Commission be left as an alternative route? What will the impact of such reform be on the organizing potential of unions? Reform may very well be needed but it is particularly

difficult to approach through the important but localized issue of whether or not to abolish mandatory retirement.

If immediate reform is thought to be needed

Despite the foregoing it is, of course, possible to decide to recommend a mechanism for resolution of claims by those who believe they have been dismissed because they have reached what otherwise would have been the age of retirement. And there would be no shortage of models to consider subject to the constraints imposed by section 96 of the Constitution Act, 1867.

Focussing upon civil actions for the moment, mandatory mediation before commencement of proceedings or in their initial stages is one possibility. Mediation is being used to resolve family and matrimonial litigation, with claims of substantial success, and has long been used in the labour relations context. It has also been used in the United States to resolve disputes arising from environmental issues. The theory is that the parties will reach a solution more quickly and satisfactorily if there is early intervention of a third party who does not impose a solution upon them but assists them in reaching one themselves. So, for example, it would be possible in civil actions involving claims alleging dismissal for age for either party to request a judge of the appropriate court to order the claim to be mediated. But to expect the parties to bear the cost of the mediation would impose a chilling effect in terms of added expense. A more palatable alternative might be to have the mediator's cost paid for by some government office such as the officer who conciliates in Ontario Human Rights Commission proceedings or the industrial relations officer under the expedited arbitration process authorized by section 45 of the Ontario *Labour Relations Act* described below. Of course it must be recognized that this is not eliminating the costs of mediation but is simply transferring them from the immediate parties to the state.

In at least one jurisdiction in the United States, South Carolina, mediation has been used by the state's Department of Labour as the primary means of resolving claims for unjust dismissal and a study of it characterizes such efforts as successful. But some caution has to be exercised here since the Department does not seem to have kept precise records on the outcome of cases it handled and no control group was utilized so that rigorous comparison could be made between the results in like cases where mediation was employed and those where it was not.

The difficulty with pure mediation is that no resolution can be imposed and there is the risk that an additional step would be added to the litigation without offsetting benefits. Moreover there have been misgivings expressed about using mediation when there is an imbalance in the relationships of power between the parties and this could be the case the more powerful the employer and the less senior in status the employee. Finally, there is also a mediation process in place now through the existing device of the pre–trial conference although, admittedly, it comes late in the action, just as it is readied for trial. Despite some enthusiastic claims the efficacy of the pre–trial in enhancing settlement is not clear.

A second alternative, at least in the case of civil cases, and one with more "teeth" would be some form of court–annexed arbitration. Here when a suit involved an allegation of dismissal because of forced retirement, a judge would refer it to arbitrators to render a decision. In order to foreclose an allegation of discrimination or deprivation of the right of access to a court a party could be allowed to continue with the civil action even after the arbitral award. However, if the party insisting on proceeding did not do better at trial than at arbitration (won instead of lost, received a substantial increase in amount of damages awarded etc.) then the party could be substantially penalized in costs.

In the United States where projects with court–annexed arbitration have been implemented, in fact, a major issue has been the promotion of acceptance of the arbitrator's award or settlement by the parties without trial. Thus some programs encourage acceptance of the decision of the arbitrator by emphasizing its adjudicative aspects: the presentation of facts and arguments and an award of the arbitrator which stands as the court judgment except if one

of the party forces the proceedings to a court trial. But other projects underscore the potential for private settlement within the court–ordered process. For instance, in one program in Wayne County, Michigan a panel of three meets with lawyers for the parties with a view to establishing a settlement value acceptable to both parties. If the parties agree to that amount, the mediators' award is that figure. If the parties do not agree, the mediators spend a brief time attempting to reach an agreement and if they do so they make an award based on that figure and that award becomes final if not objected to within 40 days. If rejected, the objector can proceed to a court trial but there are substantial costs penalities if the objector does not better its position at trial by in excess of ten percent.

Some court–annexed arbitration schemes have been of dubious success. For example, a project in California was found to actually delay the time the case would have otherwise taken to have gone to trial. This was because the point in the litigation where arbitration was ordered came at such a late stage that by the time the arbitration had been held the case could have been resolved by trial. Nonetheless, studies in some projects reveal that those involved see them as delivering a satisfactory quality of justice. Most represented litigants view such programs as fair and are satisfied with the procedures and process of court–annexed arbitration. But evaluation of these experiments suffer from the fact that they have not been done on a controlled basis which would have allowed assessments based on reliable comparisons between court–ordered arbitration and the established procedures for comparable cases. Such studies, which have now begun will allow critical evaluative statements to be made, for instance, the number of trials, time to trial, length of trial, etc. for cases arbitrated as opposed to the number of trials etc. for cases with similar issues and claims but not arbitrated. Absent such studies enthusiastic statements concerning such programs must be viewed cautiously: "Until the results of studies such as these have been analyzed, no final verdict can be reached on the value of court–ordered arbitration".

Court–annexed arbitration of wrongful dismissal has, in fact, been proposed in the United States. However, this material has to be viewed in a larger context. Common law actions for unjust dismissal are severely circumscribed in the United States so such proposals not only advance a means for resolving such disputes (by arbitration or court–annexed arbitration) but also create a just cause standard where it would not have existed in an American civil wrongful discharge action.

The present Attorney General has recently indicated his enthusiasm for court annexed arbitration. The Ontario Courts Inquiry, conducted by Mr. Justice Zuber of the Court of Appeal, has made recommendations concerning this device. Civil actions involving claims for unjust dismissal of senior employees could be part of a generally applicable project involving court–annexed arbitration or could be an aspect of a more specifically designed study, say one involving any claims for unjust dismissal.

Finally, those who are attracted to arbitration as an alternative to the courts can avail themselves of a form of private adjudication and by–pass the courts altogether by having a written contract of employment one clause of which stipulates that any disputes arising under the agreement (including claims concerning the termination of the contract) will be resolved by arbitration. Whether such a method will necessarily be less expensive and quicker than a civil action, particularly one settled at an earlier stage, is not so clear. One American study concluded that though arbitrated cases were processed more quickly than court cases the arbitrated cases were more likely to be "decided" rather than "settled" and that arbitration processing was not necessarily less costly than court processing.

The primary "alternative" which Canadians have used in the past to resolve disputes is some form of administrative law model and this is promiment in the labour field. There are thus many models which could be adopted with a view to providing an accessible and cheaper method of dispute resolution. It could also be used to reform specific issues such as allowing the decision maker to reinstate a discharged employee who, absent a collective agreement, would not have that protection now.

Thus, for example, there is the model of section 61.5 of the Canadian Labour Code, discussed earlier, which provides for a state–funded form of adjudication (arbitration) for non–unionized

employees within the federal jurisdiction. This mechanism is optional and does not take away the civil right of action. Initially, there were reservations by some unions concerning the process presumably on the grounds that in giving enhanced protection to unorganized workers a basic motivation for becoming a union member would be removed. However, this opposition seems to have dissipated since the threat does not appear to have been realized Basically, there are a number of threshold requirements to meet: the person must be in an employment relationship — independent contractors are excluded; employment must have been continuous for twelve consecutive months within the federal jurisdiction, there has to be a dismissal which does not include layoffs due to lack of work or a function which has disappeared; the person cannot be a manager nor a member of a group subject to a collective agreement nor be able to invoke any other statutory procedure for redress; the claim must be filed within thirty days of dismissal, or much longer as permitted by the Minister. There is then a process of mediation by an inspector and if he fails to have the parties reach an agreement he then reports to the Minister. If the person meets such requirements the Minister of Labour has discretion to refer the claim to an adjudicator for final and binding decision or he can refuse to deal with it and dismiss it.

At adjudication the adjudicator may set his own procedure but he is obliged to permit the parties appearing before him the opportunity to present evidence and to make submissions to him. He can summon witnesses, administer oaths and receive evidence which he judges appropriate even if it would not be admissible in court. The remedial powers which the arbitrator possesses are broad including, most importantly, the capacity to order reinstatement, and also to award lost compensation equalling remuneration, and to grant equitable relief to remedy or counteract any consequence of the dismissal.

To give some idea of the workload generated by s. 61.5 the number of complaints referred to adjudication has varied from a low of 78 in 1982–83 to a high of 140 in 1985–86. These numbers would not appear to be burdensome considering the breadth of the applicability to the section. However, in any one year the number of complaints referred to adjudication in which there is a hearing held substantially exceed the number settled. These figures may suggest that the parties, once an adjudication is ordered, do little to resolve the disputes themselves.

Quebec has similar procedures to the Canada Labour Code which could also be looked to. In addition, the Quebec Labour Standards Act provides for a complaint directly to the labour commissioner–general for hearing before a labour commissioner appointed under the Quebec Labour Code when an employee has been dismissed for certain specific reasons. In 1982 the legislation abolishing mandatory retirement amended the Labour Standards Act to include as a ground for such complaint dismissal based on attainment of an age at which the employee would have had to retire but for mandatory retirement's elimination. After receipt of a written complaint sent within the time limit the labour commissioner–general appoints a labour commissioner to make an investigation and decide as to the complaint. The presumption is in the employee's favour once it is shown she exercised a right arising from the Labour Code. The quantum of an indemnity is fixed by the labour commissioner on application of the employer or employee. The experience of complaints on these grounds before labour commissioners is reviewed in the Provision Prospective Inc. paper prepared for the Task Force.

It would also be possible to utilize existing administrative mechanisms in Ontario to provide a means to handle wrongful dismissal claims for those alleging "unlawful retirement." For example, it appears that an employment standards officer under the *Employment Standards Act* may make orders to ensure that a woman who has taken pregnancy leave in compliance with the Act is allowed to return to her position and any order which the employment standards officer makes is reviewable by a referee appointed under the Act. The *Employment Standards Act* could be modified to provide that an employment standards officer or some other official could make orders, reviewable by referees, concerning reinstatement of employees who allege discharge because of "unlawful retirement."

Finally, the Ministry of Labour now has an apparatus for expedited arbitration in the

collective agreement context. If a grievance is referred to this process the Ministry sends an industrial relations officer who assists in attempting to settle the dispute. Meanwhile the Ministry also appoints an arbitrator from its lists of accredited neutrals and he must hold a hearing within 21 days of the referral unless the matter is resolved, say, through the work of the mediator. Again this process could be expanded to make it available to any employee, whether organized or not, who is alleging dismissal because of age when she would have had to retire but for the abolition of mandatory retirement. It could also be expanded to make it available to an employer who has been sued civilly for wrongful discharge. For example, legislation could stipulate that either party in a civil action in which the complaint was that the employee had been wrongfully discharged because he or she had reached an age which but for abolition of mandatory retirement that employee would have been forced to retire could move to have the action stayed so that the arbitration process just described could be invoked and a disposition made. Costs penalties could be imposed upon a party who sought to continue with the civil action once an arbitral award had been made. However it might also have to be stipulated that a court could award the same remedies as an arbitrator in these circumstances so that if an arbitrator was given the power to reinstate and did so a court would have the capacity to make the same award should the case be pursued in the courts once an arbitration award had been granted.

Yet just because there are models for constructing some novel method of resolving such claims does not answer the question of whether it should be done and the details for doing so. Any policy maker who wished to craft such a method (particularly if done in isolation, as opposed to, say, a broader reform of methods of resolving claims for unjust dismissal) would have to respond to a series of questions:

(i) The goal of the new mechanism would presumably provide for speedy, flexible and inexpensive resolution of such claims (beyond the alternatives existing now such as the Ontario Human Rights Commission). The question is why should these claims be preferred in that way to any number of other worthy claims such as those involving religious discrimination or discrimination involving sex, for example, involving pay equity?

(ii) Is the reform to oust other methods of dispute resolution of the issues: civil actions, arbitration, Ontario Human Rights Commission procedures, *Employment Standards Act* procedures or is it to co –exist with them and if so, are there to be provisions dealing with issues like election of method, access to method by defendant as well as plaintiff and duplication of decisions. If it is to co–exist how can multiple methods of resolving these same issues be justified?

(iii) Is the reform to allow reinstatement as a remedy to unorganized senior workers, thus conferring a remedy which they, at present, do not possess? If they are to have this remedy why shouldn't *any* worker who has been wrongly discharged have access to it? This is particularly important in light of what will be very few such claims compared with claims for wrongful dismissal generally.

(iv) Should the process apply to organized workers or would this undermine the premises of collective bargaining?

If the process is to apply to organized workers will they be entitled to carriage of the proceedings? If this is the case why are they so entitled when organized workers in other circumstances would have to depend on the union to make decisions about grievance and arbitration? On the other hand, if they are to have carriage of the proceedings are they to be left to their own devices in terms of expense?

(v) Should a remedy be available if the discharge is due to redundancy?

(vi) Should the process be available as of right or should it be subject to some strainer such as ministerial discretion?

Conclusion

Our conclusions can be stated concisely. There seems to be no foundation, in the short term, arising from experience in other jurisdictions which have abolished mandatory retirement to worry that there will be a "flood" of claims for unjust dismissal in court actions, procedures under collective agreements or otherwise. Yet it is possible over time that patterns of work could

change so substantially that there would be a substantial increase in claims.

On that assumption we have sketched an outline of a study which could be conducted concerning claims for wrongful discharge, generally, and in particular by senior employees. Finally, in case it is concluded that some change is needed immediately after mandatory retirement's elimination we examined models which could be used to implement such reform though we have indicated the desirability of considering these issues against the larger context of questions involving employer–employee relations.

6

The Process of Employee Evaluation and Dismissal

Introduction

This discussion examines the potential implications of the abolition of mandatory retirement for several aspects of the employment relationship in both collective bargaining and individual employment contexts. The focus will be on the potential implications of abolition in terms of increased incidents of claims of dismissal without just cause and potential changes to the employment relationship to deal with such an increase. However, we will also touch on other potential effects of the abolition of mandatory retirement in the employment relationship, including implications for the use of seniority as an operative principle in important employment decisions and the use of monitoring and appraisal systems for the evaluation of employees' competence and capacities.

Numerous authors have suggested that abolition is likely to lead to a significant increase in incidents of discharge for cause and subsequent claims for wrongful dismissal because employers can no longer rely on mandatory retirement to terminate their relationship with employees who become unproductive or incompetent in their later years. This suggestion is based on the premise that one of the prime motivations for the existence of a fixed retirement age is to minimize the need for the employer to monitor and appraise the performance of older workers. With the knowledge that less productive older workers will be with them only until the fixed retirement date, employers may be willing to retain such workers and even grant them normal increases in compensation rather than trying to remove them through embarassing and costly termination proceedings. However, faced with the prospect of an indeterminate relationship with incompetent or less productive employees, employers could be forced to terminate such employees for cause and, in order to provide the evidence for such termination, to monitor and appraise employee performance and capacity much more closely than is the present case. It could also be that employers will attempt to cull their work force of weaker employees earlier in their working life to avoid the possibility of facing age discrimination complaints if forced to terminate them later. Thus there may be an increased incidence of termination for cause in both the middle and older age groups in the work force as a result of the abolition of mandatory retirement.

It has also been suggested that the prospect of an indeterminate employment relationship with older employees who have become less competent will cause employers to question the use of seniority, particularly in the unionized context, as a fundamental operating principle in decisions concerning employment status and security, such as promotion, demotion, layoffs, and reductions in the workforce. In short, the suggestion is that the abolition of mandatory retirement will cause employers to try to move away from recognition of seniority as an essential criterion in such decisions, to more performance and skill based criteria as employers can no longer rely on a fixed retirement date to ensure that most employees retire before their capacity or competence diminishes or that diminished competence will only have to be tolerated for a limited period.

Experience in jurisdictions which have abolished mandatory retirement (Quebec, Manitoba, New Brunswick) or increased the age of mandatory retirement (the United States from 1978 to 1986) has not yet revealed data to support these suggested implications. In short, there is to date no solid evidence of increased terminations for cause (or unjust dismissal claims), more stringent performance evaluation procedures by employers, a change in attitude towards the use of seniority in employment decisions, or implications for other aspects of the employment relationship.

Nevertheless, one must be cautious in accepting this lack of evidence of suggested ramifications of the abolition of mandatory retirement because of the relatively short time frame since abolition in the jurisdictions where it has been abolished. As some observers have pointed out, there has

For further reference: Brian Etherington, *Some Implications Concerning Employer–Employee Relations Should Mandatory Retirement be Abolished,* Part III, a report commissioned by the Task Force.

been a relatively short time period for these implications to surface and persons affected by the policy change in the short term are likely to have been acting under expectations and consequent planning based on a legal regime which included mandatory retirement. As the working population adjusts to the changing legal context (absent the reality of a fixed retirement age) some of the ramifications suggested above may appear in the long term.

For this reason, it is important to explore the ramifications of a potential increased need to terminate employees for incompetence and the consequential effects of increased monitoring and appraisal of performance and undermining of the principle of seniority, with a particular emphasis on the legal context. It is also important to analyze legal means other than dismissal for cause, such as the giving of reasonable notice, the use of limited term contracts, and defined notice periods in written employment contracts, which may be available to employers in the non–unionized setting to respond to any actual increased need by employers to terminate incompetent employees in the absence of mandatory retirement.

However, at the outset we wish to discuss an idea that is central to the potential impact of abolition of mandatory retirement on employer personnel practices. Employer practices concerning termination for cause or by some of the alternate devices discussed below, performance monitoring and appraisal, and the use of seniority as a decision making criterion, are likely to change significantly as a consequence of abolition only if there are a significant number of unproductive or incompetent senior employees who choose to stay in the work force past present retirement ages. The contention that significant changes in employer personnel practices will result is based on the premise that employers may face indeterminate relationships with incompetent senior employees who will no longer retire in the absence of compulsory retirement. Thus the primary determinant of the extent to which employers actually will alter personnel management practices should be the extent to which older workers choose to stay on when they are no longer competent or productive. To the extent that those employees who do choose to stay on past present retirement ages are competent and productive, there should be no legitimate motivation, beyond that which presently exists, for employers to change personnel practices to facilitate dismissal for incompetence. To the extent that the number of senior incompetent employees who choose to stay on are insignificant, there is unlikely to be sufficient motivation for employers to change current practices, as a consequence of the abolition of mandatory retirement, to overcome the inherent inertia of traditional practices, particularly in the collective bargaining context.

This general observation may not be appropriate in some specific occupational contexts, such as university professors, where there are additional interests at stake beyond the employer's interest in maintaining a competent and efficient work force. We discuss some of these special concerns in the university context below. However, for the general work force, where the primary interest at stake is the employer's ability to ensure a competent and efficient work force in the absence of mandatory retirement, the primary determinant of the extent to which abolition will have a serious impact on employer personnel management practices should be the number of incompetent seniors (rather than simply the total number of seniors) who choose to stay on in the work force past present retirement ages.

Dismissal, Discharge or Termination for Incompetence Under Collective Agreements or at Common Law

In this section we will discuss what is required to establish incompetence or disability as the basis for dismissal or termination for cause in grievance arbitration and actions for wrongful dismissal at common law. Throughout this discussion, we will point out concerns or difficulties which may be of particular significance to the termination of senior employees for incompetence or disability.

We will also discuss some alternative solutions or developments which could either lessen the need to terminate for cause in response to a significant increase of less competent senior employees deciding to stay on in the work force or lessen some of the problems with termination for cause which presently exist. However, at the outset, we wish to emphasize that any employer responses

to indefinite employment relationships with less competent senior employees, whether terminations for cause or some of the alternatives suggested below, must be implemented and applied in a non–discriminatory manner to avoid potential violations of the age discrimination provisions in the *Ontario Human Rights Code*. This would include the implementation of alternative devices which discriminate on the basis of age either directly or indirectly. For example, while it would obviously be age discrimination to adopt a practice of giving reasonable notice to all employees who were 60 years old, it would also probably be age discrimination to adopt a policy of giving reasonable notice to all employees with 35 years of seniority because of the disproportionate impact this would have on older employees.

Establishing Incompetence or Disability as the Basis for Discharge or Termination in Grievance Arbitration

Disability

Arbitrators will generally allow employers to terminate the employment of employees who through physical or mental disability are unable to report to work on a consistent and regular basis or to perform their normal job tasks. While they have recognized that such cases are not appropriately dealt with as matters of discipline because of the absence of fault on the part of the employee, they have attempted to balance the competing interests of the employee in retaining employment and the employer's interest in not having to bear the costs of employees who are unable to discharge their employment obligations for reasons of disability, by recognizing a right of justifiable termination in the employer when the employees' disability has reached such a stage that it has "undermined" the employment relationship, or caused it to be irreparably and fundamentally breached. The essential consideration for arbitrators in such cases, whether they concern employees unable to report for work or incapable of performing regular duties, is the extent to which the employee's disability has prevented him from meeting obligations in the past and is likely to do so in the future.

Thus, in cases of absenteeism due to physical or mental disability, arbitrators will focus on the evidence of past absenteeism by the employee and the capability of the employee to attend work on a consistent basis in the future. In this area, arbitrators have insisted that employers establish not only evidence of a poor record of past absenteeism but also that there is a likelihood that such conduct will continue in the future. The determination as to this second criterion will often turn on medical evidence and the effect of earlier attempts by the employer to correct the problem. Thus many arbitrators will refuse to uphold the termination where the employer has failed to establish the reasonableness of its prognosis as to the employee's capacity to attend regularly in the future. This may be the case where the employer has failed to warn the employee in the past that his job may be at risk if he fails to correct his absenteeism problem or has failed to secure a proper medical opinion on the prognosis for the future. In summary, arbitrators have recognized a power of non–disciplinary termination for absenteeism caused by disability provided that employers establish, by means of convincing evidence relevant to the prognosis for the future, that the employment relationship is no longer viable.

Similar considerations arise in the case of employees terminated or demoted due to a physical or medical disability alleged by the employer to render them incapable of performing their job in a productive and safe manner. The central criterion is whether the employee's disability is "so severe as to irreparably breach the employment relationship and deprive it of its viability." The following test for upholding termination on the basis of disability rendering the employee incapable of performing his duties productively or safely has been approved by numerous arbitrators:

> ... is (the disability) so severe that it can reasonably be concluded either that there is little or no likelihood that in the foreseeable future the employee will recover sufficiently to allow him to return to productive employment or, even if it is anticipated that he will recover to such an extent that he will be able to return to work, that it cannot reasonably be expected that he will be able to do so without endangering the person or property of himself, his fellow employees or his employer.

Each case will, of course, turn on the facts relating to the employee's condition and the duties and environment of the workplace, with a tendency to place great weight on the available medical evidence, but a few observations can be made. Arbitrators have generally required the employer to demonstrate that the risk presented by the disability to the employee, to his fellow employees, or to the employer's property, be real and immediate, substantial and significant, or above normal. In addition, some arbitrators have required that the employer base its decision to terminate solely on the merits of the individual's condition and not attempt to rely on a universal company rule disqualifying persons as unfit for employment who had suffered a particular medical condition. Thus, a transport company could not rely on its company rule that any employee who had suffered a heart attack was unfit to continue driving trucks for the company as a basis for denying an employee who had presented evidence that he was medically fit the right to return to employment.

Finally, unlike the case of termination for non–culpable incompetence which will be discussed subsequently, arbitrators have generally not required employers to offer persons found to be incapable due to disability other positions in the work force in the absence of a specific collective agreement provision or past practice to the contrary.

Non–Culpable Incompetence

In the area of termination for incompetence or poor work performance, the arbitral jurisprudence makes a distinction between culpable and non–culpable incompetence which is of some significance for the the right of employers to terminate the relationship. In general, arbitrators do not regard disciplinary measures as a valid response to non–culpable incompetence where there is no blame or potential for correction on the part of the employee. This has led arbitrators to treat cases of non–culpable incompetence very differently in terms of the right of an employer to finally sever the employment relationship. It appears from recent cases that arbitrators are less willing to uphold terminations for non–culpable incompetence than for culpable incompetence.

The distinction between culpable and non–culpable incompetence is not always an easy one to make, but generally the question is one of whether the employee's poor performance, careless, unsafe or poor work habits, or failure to meet reasonable production standards is voluntary, in the sense that it is within his control, as opposed to involuntary, in the sense that it is attributable to factors beyond his control (i.e. lack of capability).

Even where arbitrators have found deficient work performance to be due to non–culpable incompetence, they recognize that an employer may have a justifiable right to terminate the employee if the incompetence is such as to undermine the employment relationship and the situation is unlikely to improve. However, arbitrators seem to be coming to a consensus in recent caselaw, that an employer must meet the following stringent requirements before he can make non–disciplinary terminations for non–culpable deficiency in job performance:

(a) the employer must define the level of job performance required.

(b) the employer must establish that the standard expected was communicated to the employee.

(c) the employer must show it gave reasonable supervision and instruction to the employee and afforded the employee a reasonable opportunity to meet the standard.

(d) the employer must establish an inability on the part of the employee to meet the requisite standard to an extent that renders him incapable of performing the job and that reasonable efforts were made to find alternate employment within the competence of the employee.

(e) the employer must disclose that reasonable warnings were given to the employee that a failure to meet the standards could result in dismissal.

It is important to note that the critera listed above are cumulative and arbitrators in recent cases have placed a heavy onus on employers to establish that all have been met. Thus even though an employer may establish incompetence and prove that all of the other requirements have been met the termination will not be upheld where the employer has not made reasonable efforts, considering all the circumstances including length of service of the employee, to transfer the employee to an alternate job that he is capable of performing.

The recent decision in *McKellar General Hospital* is illustrative of application of this requirement. The grievor had been with the employer for 7 years and had been a storekeeper for most of that time. The evidence showed that the employee's performance had been unsatisfactory for much of the period. In 1985 the matter of his performance became of sufficient concern that the employer, union and grievor met and agreed on a plan whereby the grievor would identify any retraining needs on his part, would have his job performance evaluated for a 45 day period with regular feedback and would then undergo a formal evaluation. At the end of this period of evaluation his performance was found to be unsatisfactory but it was decided that he should be given a futher 45 day evaluation period with a working "buddy" assigned to help him improve. At the end of this period the grievor's performance was again found to be unsatisfactory despite the fact that he was trying to do better. The employer then considered other work for the grievor but did not find a suitable opening in its work force and terminated the grievor. After giving the grievor notice of termination the employer did invite the grievor to apply for another position in its dietary department but the grievor refused.

Arbitrator Joyce, despite rejecting the final performance evaluation done by the employer for lack of appropriateness to the position involved, found that the employer had proved incompetence and all of the requirements listed above except for (d). In light of the number of years for which the grievor had been performing the job involved, in order to satisfy criterion (d) the employer had to take extraordinary steps to find alternate employment before terminating the grievor's employment. Because of the peculiar facts of the case (this was an expedited arbitration and the grievor had been given 6 months notice of termination so that he was still employed at the time of the award), the arbitrator was able to order the employer to notify the grievor of any appropriate job vacancies which the grievor could then apply for until his termination date. If the employer was unable to place the employee by his termination date, the employer was required to then place the grievor on lay–off where he would be entitled to exercise his seniority rights with respect to any vacancies that arose. The grievor was also placed under an obligation to accept any appropriate alternate position offered to him by the employer and failure to do so would nullify all of his rights under the award.

While this award may appear to be extreme, it is indicative of a general trend in arbitration decisions to take seriously the duty of employers to try to find alternate employment where the employee is found to be deficient in performance by reason of non–culpable incompetence. In general, unless the employee is shown to be incapable of performing any work, most arbitrators have found that the proper course of action is to transfer or demote the employee to another position appropriate for his capability. In some cases arbitrators have gone further to find that where such an alternate position is not immediately available, the proper course is for the employer to lay him off or place him on non–disciplinary suspension, on the understanding that he will be able to exercise her seniority rights with respect to positions that subsequently become open.

In a related fashion, arbitrators have increasingly recognized an inherent authority in employers to implement non–disciplinary demotions where the employer has established deficient work performance due to non–culpable lack of competence on the part of the employee. In this respect, arbitrators have held that the employer may properly demote an employee who fails to complete successfully a test of required skills for the job, provided that the test is relevant and reasonably tests the competence of the employee for the actual job tasks involved.

The upshot of the evolving jurisprudence on termination for non–culpable incompetence is that an employer may have a difficult time actually severing the employment relationship with an employee whose poor work performance is due to non–culpable incompetence, unless it can be shown that the employee is incapable of performing any work for the employer. In such cases, even where incompetence is proven and warnings and chances for improvement are given, there would seem to be a further duty on the employer to undertake a real search for alternative positions to which the employee can be transferred. However, there is an ancillary right of non–disciplinary demotion, and at least one arbitrator has held that where the employer has met the criteria for termination by giving the

employee a trial at another appropriate position to which his abilities should be more suited and the employee fails in the new position, the employer's termination should be upheld. In short, the employer's duty to find suitable alternate positions cannot go on indefinitely. The implications of these arbitral principles for incompetent seniors who decide to stay on in the work force will be discussed below.

Culpable Incompetence or Deficient Work Performance

Discipline, including discharge in appropriate cases, is recognized as an appropriate employer response to culpable incompetence as evidenced by a failure to meet *reasonable* production standards, careless, faulty or negligent work performance, disregard for announced safety procedures, or a pattern of poor work habits which may have been manifested in a variety of ways. In the case of culpable deficiences in work performance, arbitrators generally will not impose any duty on employers to make *bona fide* efforts to find alternative positions in its work force for the employee. In this respect, the employer is not as restricted by arbitral jurisprudence in attempts to sever the employment relationship as he may be in the case of non–culpable incompetence.

Arbitrators have upheld discharges for failure to meet minimum production standards, provided that the employer establishes that the production standards are reasonable. This has been the case even where the employee's failure has been with respect to new production standards imposed by the employer on existing jobs. However, as in the case of non–culpable deficient performance, arbitrators have generally required that the employer fully notify the employee of the deficiences in his performance, provide him with ample opportunity to correct the deficiences, and warn him of the possible consequences of a failure to improve.

Arbitrators have also been willing to sustain discharge for repeated incidents of faulty or careless work, or a pattern of unsatisfactory performance, even in cases involving senior employees. As one prominent arbitrator has stated, what is required to be shown is a pattern of persistent behaviour or performance which indicates that the employee is unsuitable or unsatisfactory. The employer will also generally be required to establish that the employee was fully instructed as to the duties he is alleged to have performed improperly and that the appraisal of the employee's performance as unsuitable was drawn against relevant and defined standards.

A few general conclusions about arbitral principles in the area of dismissal for culpable incompetence can be made at this point. Whether the case involves failure to meet production standards, careless or faulty performance, or poor work habits, the employer in all cases must show that he has given the employee adequate notice of the deficiencies in his performance and warning about the possible consequences of failure to improve. On a related issue, because culpable incompetence is viewed as correctable, arbitrators have generally required that the employer adopt a corrective progressive discipline approach to such incompetence. Thus, discharge may be found to be an inappropriate penalty unless the employer can establish that there has been a pattern of deficient performance despite reprimands or suspension by the employer. And finally, some arbitrators seem to be of the view that, in the absence of a provision in the collective agreement to the contrary, it is part of the employer's general management rights to set reasonable performance or production standards and to implement a system of evaluation of an employee's performance. We will discuss the issues surrounding the potential for greater employer use of performance appraisals in the collective bargaining context at greater length below.

After some earlier reluctance, arbitrators have also come to accept the employer's right to impose temporary disciplinary demotions as an appropriate penalty in cases where the employer has established just cause in the form of culpable deficient performance. This is now seen as a disciplinary device which is consistent with a corrective approach to discipline for culpable incompetence.

Summary

This brief summary of the arbitral jurisprudence reveals that arbitrators have attempted to balance the interests of employees in job security and the employer's interest in a productive and

competent work force by recognizing the employer's right to discipline and discharge for culpable incompetence and to terminate, transfer or demote for non–culpable incompetence, but at the same time imposing some procedural and substantive safeguards to protect the employee's interests. In the area of culpable incompetence, arbitrators will uphold disciplinary responses, including discharge, for deficient work performance in the form of low productivity, careless or faulty work or poor work habits, provided that the employer has observed basic requirements of fairness and has adopted a corrective approach to discipline to which the employee has failed to respond. Similar due process requirements are required in the case of non–culpable incompetence, although the employer will not be required to show a progressive approach to discipline as this type of incompetence is viewed as incorrigible.

The one aspect of the jurisprudence which is potentially of the greatest concern to employers facing the abolition of mandatory retirement would seem to be that of termination for non–culpable incompetence. If it is true that employers presently do carry some older workers who have become less productive or incompetent to the mandatory retirement age, it may be that such workers fall into the non–culpable category, those who through factors beyond their control lose the capacity to do the job properly. Arbitral principles, by placing a duty on the employer to make every effort to place the non–culpable incompetent into alternate positions, could be an impediment to the employer's ability to sever the employment relationship with older incompetent workers who choose to stay on despite failing capacities. This is particularly the case in light of arbitral decisions such as *McKellar Hospital* which have imposed a duty on employers to put such employees on layoff where a position is not immediately available and required that they be allowed to exercise their seniority rights for future positions. The older incompetent worker is likely to have considerable seniority and, depending on the nature of the seniority clause in the collective agreement, good prospects for entitlement to future vacancies. Thus the employer may face the prospect of a considerable obligation to continue the employment relationship of an aging employee with failing capacities for an indefinite period, unless he can establish that the employee was incompetent to perform any of the jobs in the employer's workplace.

This, of course, will only present a problem to the extent that such workers choose to stay on and there are several reasons for speculating that the numbers will not be great. First, there are the empirical studies discussed earlier that indicated that older workers generally will not be predisposed to stay on. In fact, the trend in the organized sector, and for blue collar workers in particular, has been towards earlier retirement and not later retirement. Second, arbitrators have recognized an inherent right on the part of employers to demote employees for reasons of non–culpable incompetence. Given the influence of factors such as pride and peer pressure, it may be unlikely that aging workers with failing capacity, faced with the prospect of a non–disciplinary demotion, will want to stay on if they have adequate retirement benefits as an alternative. In this regard, the evidence that pension plans are prevalent in the collective bargaining context could also be a significant factor.

In any event, to the extent that the abolition of mandatory retirement in actual practice does present a problem for employers in the collective bargaining context because of arbitral principles concerning non–culpable incompetence, employers can seek solutions through collective bargaining. For example, they could seek to negotiate provisions in the collective agreement which precluded arbitrators generally from dealing with employer actions in relation to non–culpable incompetence. A more limited measure, but one which may be more easily negotiated, could be a clause which allowed arbitrators to review employer findings of non–culpable incompetence but which precluded the arbitrator from interfering with the employer's response of termination or demotion if a case of non–culpable incompetence had been made out. Of course, similar measures could be negotiated to deal with questions of culpable incompetence. The point here, is that if a significant problem should develop as a consequence of mandatory retirement, it is not beyond the power of the employer to seek a solution through the collective bargaining process, as long as any solutions agreed to by the

parties are not discriminatory, in the sense that they focus on competence and not age.

Further, if the abolition of mandatory retirement, combined with aspects of existing jurisprudence on termination of incompetence, does in fact create significant problems for employers regarding termination of older less competent employees, changes in arbitral principles may occur to adapt to the changing needs of the industrial relations community. For example, one of the major reasons underlying the current duty imposed on employers to find alternate positions for non-culpable incompetents is to protect the interest in economic security of employees who are essentially blameless. It might be the case that arbitrators would find this interest is not present where the employee concerned would be entitled to adequate pension and retirement benefits if the relationship is terminated and therefore, in such cases, the duty of the employer to find an alternate position for the employee should be watered down or removed. Arbitral jurisprudence has in the past adapted to the changing needs of employers and employees and has the potential to do so in future if the need does arise.

Finally, we would also point out that the duty imposed on employers to attempt to place the non-culpable incompetent in an alternate position appropriate to his capacity may not pose a significant threat to the employer's primary interest in having a competent and efficient work force. The *McKellar Hospital* principle, when considered together with arbitral recognition of an employer's right to demote for incompetence, could represent a reasonable accommodation between the employee's important interest in continued employment and the employer's interests. This balancing of interests may not unduly hamper an employer's ability to maintain a productive work force, if faced with a number of older less competent employees who choose to stay on in the absence of mandatory retirement. Arbitrators have recognized that the employer should not be required to keep employees in positions where they are incapable of performing the required duties and have only required the employer to retain the non-culpable incompetent where there is an alternate position suited to his competence. This does not seem to us an unreasonable accommodation of both parties' interests. Indeed, it may not provide a legitimate basis for fears that employers will be unable to deal with incompetent senior employees who decide to stay on.

Dismissal for Incompetence at Common Law

In the common law of the individual employment relationship, in the absence of an enforceable contractual term to the contrary, the courts have held that there is an implied contract for an indefinite period, terminable only upon reasonable notice given by either party or proof of just cause for dismissal by the employer. In the event that the employer terminates for cause or gives notice of termination (or compensation in lieu of notice) that the employee considers to be inadequate, the employee can bring an action in contract for wrongful dismissal before the civil courts where he may be awarded damages (but not reinstatement) if the employer fails to satisfy the court that it had just cause for dismissal or, alternatively, provided reasonable notice to the employee. If the employee is successful, damages will be given primarily on the basis of the compensation and benefits which he was deprived of by the employer's failure to give reasonable notice. The appropriate length of reasonable notice in any given case is heavily dependent on the factual context, but in general the courts seem to give great weight to the employee's length of service with the employer, salary level, job status, labour market conditions for the job at issue (difficulty of finding a *comparable* position), and the age of the employee.

The forms of just cause can be roughly divided into the two broad categories of misconduct and incompetence. For economists and employers who are concerned that the abolition of mandatory retirement will result in increased dismissals for cause because employers can no longer rely on mandatory retirement to terminate the employment relationship with incompetent employees, the requirements to establish incompetence as just cause are of greatest concern. Other relevant and related issues are:

(1) To what extent could employers rely on a practice of simply giving reasonable notice

to terminate its relationship with older less competent employees?

(2) To what extent could employers rely on limited term contracts or written employment contracts for an indefinite term with defined notice periods for termination, to cope with potential problems with incompetent employees that follow abolition of mandatory retirement?

(3) Given the current common law doctrine of wrongful dismissal, to what extent would the abolition of mandatory retirement create a *perverse incentive* for less competent senior employees who have no desire to continue working but refuse to retire in order to obtain a favourable severance settlement or "buy out".

Following a discussion of the requirements for establishing incompetence as just cause, we will return to a discussion of these related issues.

Incompetence as Just Cause for Dismissal

At the outset it must be noted that the onus is on the employer to prove incompetence in the objective sense. The subjective beliefs of the employer as to the competency of the employee cannot be determinative, and the issue is whether the employee's performance fell below a reasonable objective standard. Therefore, even though the employer may no longer have confidence in the employee's ability to competently perform his duties, if incompetence, objectively determined, has not been made out the employee will succeed in his action for wrongful dismissal. However, consistent with this objective approach to just cause, the courts make no distinction between culpable and non–culpable incompetence and do not impose any duty on the employer to attempt to transfer incompetent employees to alternate positions.

There has been some inconsistency in the case law as to the required standard of incompetence which the employer must make out to defend successfully a wrongful dismissal action. Several courts have held that the employer must establish a standard of "serious" or "gross" incompetence. However, several recent Ontario decisions, while recognizing that employer dissatisfaction is not sufficient, have taken the position that there is only a requirement to prove gross incompetence where the dismissal is abrupt, without prior notification of deficiencies and warnings that the employee's job is at risk. In cases where the employer has provided prior warning about deficient performance and given adequate time for improvement, it will not be required to prove such a severe standard of incompetence and it would appear that a pattern of less competent behaviour may suffice.

The severity of the standard of incompetence which must be proven to establish just cause is also likely to be affected significantly by the length of service of the employee with the employer. There would appear to be strong judicial sentiment for the general rule that the conduct relied on as constituting just cause "must be more serious in order to justify the termination of a more senior, longer–service employee who has made positive contributions to the company." Obviously, if employers do face a substantial number of senior employees who choose to stay on despite failing productivity and competency, this principle could cause employers to experience serious difficulties in attempts to deal with the problem by terminating for cause.

In recent years, the courts have imposed significant procedural fairness requirements on the workplace in the area of dismissal for cause, and dismissal for incompetence is no exception. This is evidenced by requirements that to prove just cause the employer must establish, in addition to deficient performance: (1) that the employee was notified of deficiencies in his performance and the standards of competence required; (2) the employee was warned specifically that his job was at risk unless there was improvement; and (3) the employee was given a reasonable opportunity to improve after the warning and prior to termination. It should be noted that at least one decision has held that the length and quality of prior service of the employee should be considered in the determination of what is a reasonable time frame for improvement of performance after warning.

These requirements for procedural fairness can create serious problems for employers who have tolerated deficient performance on the part of a senior employee for many years, without providing adequate notice of deficiences or specific warnings about risk to his job. The

concept of condonation, which requires an employer to take action to terminate an employee for cause within a reasonable time after learning of an employee's misconduct or incompetence or he may be precluded from relying on the poor conduct for just cause, may add to the employer's difficulties in such cases. For employers who have "carried" unsatisfactory employees in the past, the abolition of mandatory retirement could heighten these problems if significant numbers of less competent workers decide to keep working.

However, several decisions have held that, even where the employer has tolerated a number of years of deficient performance and failed to test the employee's ability adequately during that time, the employer is entitled to give the employee clear notice of new *reasonable* standards of performance that are within the employee's capacity, with a warning that his job is at risk, and ultimately to terminate the employee if he cannot meet the new performance requirements within a reasonable period of time. In such cases, the court appears to give significant weight to the seniority of the employee in assessing the reasonableness of the new level of performance required and the time allowed for improvement.

There are several other principles which can be derived from the caselaw and may be of some relevance to the situation of employers attempting to terminate older employees for incompetence. These principles are taken from a summary of the caselaw on incompetence as just cause.

(1) An employer may be required to prove that the employee's performance is worse than that of other employees performing the same or similar job functions. This requirement would seem to be consistent with the fairness requirements noted above, or the employee might assume that his performance was acceptable if there were other employees performing at the same level.

(2) If an employee advises the employer, of his or her capabilities and qualifications, and the employee is hired on that basis, the employer cannot later increase its standards *in terms of capabilities and qualifications* required and terminate the employee for failure to meet the increased standards.

(3) For an employer to rely on the consequences of an employee's performance (for example, business losses or low sales) as proof of the employee's incompetence, the employer must show the employee's deficient performance was actually responsible for the consequences at issue. In one case where the employee was dismissed for failure to meet a sales quota and the employer argued that this resulted from market conditions rather than deficient performance, the court held that the employer had failed to prove just cause because it had failed to meet its burden of proving "the fact of incompetence and its connection with the loss." Of course, the flip side of this requirement is that employer's defence may be rebutted if the employee can establish temporary factors, external to the employee, which explain the bad performance.

(4) Where an employee who has a record of prior satisfactory performance transfers to a job requiring different skills and the employer has reason to know the employee may not have all the skills required for the position, the employer is unlikely to be able to establish cause on the basis of incompetence of which it should have been aware.

(5) The employer will have difficulty establishing just cause if it did anything to contribute to the employee's problems, or failed to support the employee or take action to assist him in remedying problems when it could have done so.

(6) Performance appraisals or evaluations may be a double–edged sword. The employer's chances for establishing just cause in the form of incompetence may be irreparably damaged by a recent positive performance evaluation prior to the termination. Courts are prone to view such evaluations as a representation to the employee that his performance was satisfactory. This can often present serious problems for employers, especially in the case of long term employees, where supervisors may be reluctant to complete performance evaluations in a candid fashion which reflects their honest objective assessment of the employee's performance. However, a negative performance evaluation which is both relevant and appropriate to the duties of the position may be treated as a significant piece of evidence to support the employer's claim of incompetence,

especially where it is not disputed in any material respect by the employee at the time of evaluation.

(7) The employer does not have to establish that the employee's performance was particularly poor in any one particular aspect, or that there was one particular incident demonstrating serious incompetence to justify termination. The employee's overall performance can be looked at cumulatively and it would appear that where there is a pattern of incidents or failure to perform job responsibilties properly, a case of termination for incompetence may be made out.

(8) Of critical significance to the potential problem employers may face if mandatory retirement is abolished, is the general sentiment that incompetence should be balanced against factors such as length of service, age and prior positive service. If a long service employee has performed satisfactorily over a number of years, the courts will generally be loathe to uphold termination for a relatively short period of poor performance prior to the time of termination.

(9) There is also some suggestion in recent cases that evidence of deficient performance insufficient to meet the standard of just cause for incompetence should be considered by the courts to reduce the period of reasonable notice for which damages are awarded.

(10) In the case of incompetence to perform due to illness or disability, the courts make a fundamental distinction between temporary and permanent illness or disability. Temporary illness or disability rendering the employee incapable of performing his duties satisfactorily will not constitute just cause but permanent disability or illness will justify termination or be found to have frustrated the contract. The courts have had difficulty in determining what constitutes permanent as opposed to temporary illness. In two English cases, both involving employees who were disabled by illness for 18 months, the court came to opposing views on whether the respective employees had been properly terminated. Levitt, takes the position that the courts will find discharge to be justified if the employee is not able to establish that he will be physically capable of returning to his regular duties within a specified time frame of a few months. However, the cases seem to indicate that courts, in deciding whether termination is justifiable, show great sympathy towards employees whose illnesses result from either their employment or the pressures of their employment.

Generally it will not be open to an employer to attempt to demote employees who have become incompetent or less productive to positions more appropriate for their competence unless the employer can establish just cause in the form of incompetence. Such demotions are treated by the courts as constructive dismissal and leave the employer open to claims for wrongful dismissal.

This brief survey of the law of termination for cause with respect to incompetence or illness illustrates that employers *could* face serious difficulties in attempts to use termination for cause as a solution *if* the abolition of mandatory retirement does, in fact, lead to a significant number of aging employees who are incompetent or less productive choosing to stay on for an indefinite term. The principles discussed above do appear, in several respects, to make it more difficult to terminate senior long service employees for incompetence and where just cause is not made out the amount of damages for reasonable notice will usually be adjusted upward significantly for length of service.

To the extent that these problems are actually realized by employers, they may have an incentive to avoid the difficulties of terminating senior employees for cause by seeking to cull their work force of less competent employees at an earlier stage of employment. This, in turn, could cause them to alter personnel management practices by enhancing the monitoring and evaluation of all employees on a regular and continual basis. The issues raised by the prospect of greater monitoring and appraisal of employees' competence are discussed further below. However, at this point, we turn to a discussion of other legal mechanisms which may be available to employers to deal with the problems of an indefinite employment relationship with less productive employees should they arise.

The Practice of Giving Reasonable Notice to Sever the Employment Relationship

At common law, unlike the situation under a collective agreement, the indefinite employment relationship may be terminated for just cause *or* by giving reasonable notice. Thus, if the employee is given reasonable notice of his termination, he will have no cause of action for wrongful dismissal. The fear that abolition of mandatory retirement could result in more terminations for cause and, consequently, more actions for wrongful dismissal, is sometimes responded to with the assertion that this will not be the case because employers can simply give reasonable notice to terminate the indefinite relationship if problems arise. While this would appear to be a simple and attractive solution, albeit involving some expense, there could be both legal and practical problems involved.

First, it is highly unlikely that this will be a viable substitute for mandatory retirement as a means of terminating the employment relationship with older employees, whether competent or incompetent. Any practice of terminating older employees by means of reasonable notice will preclude actions for wrongful dismissal if the length of notice is sufficient, but will not preclude claims of age discrimination before the Human Rights Commission, and is likely to result in meritorious claims if it can be established that age was a factor in determining who was terminated by this means. Thus, while an employer may be able to successfully defend an age discrimination complaint if he can show that he acted under a policy for terminating employees with notice that was totally unrelated to the age of the employee, he will be unable to follow a practice of terminating with notice older employees who are approaching a certain age.

A second legal difficulty which may arise from attempts to terminate with notice is linked to the flexible nature of the concept of reasonable notice and the principle of condonation. If the employer attempts to give reasonable notice he will be second guessing what the court might find to be reasonable notice in the circumstances. The employee is not precluded by the giving of notice from bringing an action for wrongful dismissal on the basis that the dismissal was without cause and without sufficient notice. While the employer, with the help of specialist counsel, may be able to make fairly educated estimates of the period of reasonable notice by considering relevant factors such as job status, length of service, age, and the difficulty of finding comparable employment, reasonable notice is a flexible legal concept which has undergone significant change in recent years. In addition, the attempt to give reasonable notice may preclude the employer from any defence of just cause in a subsequent wrongful dismissal action because he may well be held to have condoned the cause even if cause existed. Therefore, if the employer thinks he has cause, he may be advised by specialist counsel to terminate immediately on that basis, providing no more than a minimal severance payment and reserving the right to assert just cause.

In appropriate cases there will be practical considerations favouring termination by reasonable notice: preserving the reputation of the employer as a good employer; benefit to the employee because it is generally easier to look for a new job while employed; and giving the employer the benefit of the employees' services during the period of notice. However, in many cases there will also be practical considerations militating against keeping the employee on during the notice period: the effect on morale of fellow employees and quality of performance of the dismissed employee if he is bitter about termination; and security risks presented to business interests if the employee is senior and has access to confidential information.

Thus, when carefully considered, the practice of giving reasonable notice may not be an adequate solution, in many cases, to confront the potential problem of terminating less competent older workers who may want to continue the employment relationship after the abolition of mandatory retirement.

Limited Term Contracts and Indefinite Term Written Employment Contracts with Defined Notice Periods for Termination

Written contracts, either for limited terms or for indefinite terms but with clearly defined periods

of notice, could be useful devices for employers to deal with problems of termination of unsatisfactory employees which may follow from the abolition of mandatory retirement. Provided that these devices are used properly, they can provide an effective and enforceable means of terminating employees who are no longer desirable.

Limited term contracts are likely the less desirable of the two options. Provided that the term of employment is clearly defined, it will automatically bring the employment relationship to an end upon the expiry of the term. However, they are generally an unattractive device for employers for at least two reasons. First, if the employer inadvertently allows the employee to continue working past the termination date, even for one day, the contract of employment becomes indefinite and subject to requirements of reasonable notice or just cause for termination, unless there is some enforceable provision in the contract which prevents this. Second, the employer may face liability for the entire term if he decides to terminate the employee before the contract expires. Thus the preferable device for most employers will be written terms concerning a defined period of notice, or damages in lieu thereof, for termination without cause in contracts for an indefinite term.

Employers have experienced difficulties in the past in enforcing short notice period provisions in written indefinite term contracts in some cases involving long service employees whose job position has changed considerably since the initial employment contract was signed. The courts seemed to be quite willing to find written notice provisions, which provided for much less notice or severance pay than the employee would be entitled to at common law, to be unenforceable. They commonly relied on the grounds of unconscionability, inequality of bargaining power, or substantial change in job status to find the notice provisions unenforceable. However, the trend in recent case law, particularly in Ontario decisions, is to find such provisions enforceable unless there is clear evidence of duress, no *consensus ad idem*, or unconscionability. Three recent decisions of the Ontario Court of Appeal are illustrative of the trend.

In *Jobber* v. *Addressograph Multigraph Limited* (1980), the plaintiff had been with the employer since 1960 and by 1977 had become the national director of sales. He was dismissed with 30 days notice in 1978. The employer relied on a 1975 agreement, signed by the plaintiff, which provided that either party could terminate without cause but in the event of termination the employer would give the employee "at least 30 days advance notice of termination plus any additional notice that may be required by any applicable legislation...." The Court of Appeal held that, in the absence of any evidence of coercion or improper influence on the plaintiff, the agreement was enforceable.

In *Wallace* v. *Toronto-Dominion Bank* (1983), the plaintiff commenced employment with the employer in 1970 and after completion of a short probationary period signed a standard term contract of indefinite duration which provided that the bank could terminate employment without cause by giving 4 weeks notice or payment in lieu thereof. In 1978, after moving through several positions in the bank and training for senior management, he was dismissed when he was in the position of senior assistant bank manager. However, it is important to note that his final position, although in the management stream, was not a higher rated position in the bank's rating system than the position he had taken on in another department at the time of hiring.

The Court of Appeal found the 4 week notice provision to be enforceable on two bases. First, the plaintiff had failed to attack the enforceability of the 1970 contract in his pleadings. Nor did he attempt to raise any evidence going to unconscionability or lack of *consensus ad idem* at trial, other than some testimony by the plaintiff that he did not recall signing it and that it was not bank policy to advise new employees to get legal advice before signing the initial employment contract.

The Court went on to make the following important observation on the enforceability of such short term notice provisions:

> Furthermore, apart from any question of pleadings, the meagre evidence to be found with respect to the contract, in my opinion, does not provide the necessary legal basis upon which the

> contract can be held unenforceable by reason of unfairness or unconscionability ... Nor can I accept the argument that the bank document in question is to be dealt with as though it were the kind of standardized form agreement in issue before this court in *Tilden Rent-A-Car Co.* v. *Clendenning* ... Here, the terms were not hidden in a maze of fine print but were set forth clearly and understandably; on the evidence, there was no attempt to take advantage of the plaintiff or to exert influence over him so as to procure a contract that otherwise would not have been made; and nothing that transpired can be treated as being oppressive of him or as constituting the type of coercion that may vitiate consent.
>
> In determining fairness or conscionability, the primary concern must be within the terms of the contract considered in light of the total circumstances existing when it was made. With respect to an employment relationship, a contract between an employer and an employee may, in a given factual situation, contain terms so onerous or blatantly unfair as to warrant judicial intervention. But, in this case, it is not seriously contended that an agreement giving either party the right to terminate on four weeks' notice was unreasonable or unfair in 1971 at the outset of the plaintiff's employment. When all is said and done, the reality of the plaintiff's complaint is not that there was anything wrong with the termination provisions at that time or, indeed, for some time later, but rather that having worked for the bank until 1978, he ought in fairness to be entitled to lengthier notice.
>
> Certainly, there are readily imaginable cases where an employee's level of responsibility and corresponding status has escalated so significantly during his period of employment that it can be concluded that the substratum of an employment contract entered into at the time of his original hiring has disappeared or it can be implied that that contract could not have been intended to apply to the position in the company ultimately occupied by him. But that is not this case ... In the circumstances of this employment relationship, passage of time cannot, of itself, afford a basis for vitiating the contract.

Clearly then, relatively short term notice provisions in written contracts may be enforceable provided that they are drafted clearly and there is no cogent evidence of unconscionability, duress, or *non est factum* as judged by the circumstances at the time of signing of the contract, and the employee's job status has not risen so significantly that it can be found that the whole substratum of the contract and intentions of the parties have been undermined by the change in circumstances. An employer can avoid difficulties by following such prudent practices as drawing the employee's attention to the notice provision at the time of signing and requiring the employee to periodically sign memoranda to the contract referring to the termination provisions, and perhaps updating the notice provisions, particularly where the employee's job status changes significantly.

In *Matthewson* v. *Aiton Power Ltd.* (1985), the Ontario Court of Appeal again affirmed its predisposition to enforce written notice provisions. The plaintiff had commenced employment as a chief estimator for the employer in 1979. Three years later he was dismissed and given 4 weeks severance pay. At the time of hiring the plaintiff had signed a written contract which provided that it could be terminated without cause by either party giving not less that two weeks notice. The trial judge had held the notice provision unenforceable due to inequality of bargaining power because the employee had been unemployed at the time of hiring. Three times during his employment the employee had signed amendments to the contract's remuneration clauses which made specific reference to all terms of the contract. However, the employee's job status had not changed.

The Court of Appeal held the notice provision to be enforceable and in the process rejected arguments about inequality of bargaining power on the basis that there was no evidence of oppressive or unconscionable conduct by the employer. The Court also held that the rule of *contra proferentum* was not applicable when the language of the contract was clear and rejected the argument that such clauses could be viewed as penalty clauses. It noted that the plaintiff was experienced in business and knew what he was signing.

In summary, contractual terms providing for a period of notice which is considerably less than that which the employee might be entitled to at common law will be enforceable provided that there is no cogent evidence of duress or unconscionability and the employer avoids two major pitfalls. First, such notice provisions will be declared null and void if they provide for a period of notice which is less than the statutory minimum provided for in the *Employment Standards Act*. This problem can be avoided by wording the term so that it is considered to be amended to comply with applicable minimum notice legislation. Second, there have been several cases which have held that notice provisions will be unenforceable if the employee's job status has risen so significantly by

the time of dismissal that it cannot be said that the parties could have intended the original contract's notice provision to apply to the changed circumstances. In light of the *Wallace obiter* supporting this position, the astute employer should adopt a practice of having employees whose level of responsibility or job status changes over the years sign a series of memoranda to the initial contract of employment reflecting the changes in position and referring to the terms of the original contract. In a recent Ontario lower court decision, the court held that such a practice would make the contractual notice provision enforceable. This was in a case where an eleven year employee had risen in job status significantly but had signed schedules to the initial contract for each change in position, thereby reaffirming the terms of the initial contract on each occasion. The judge concluded that in such circumstances a court would conclude that the notice provision did reflect the intentions of the parties despite the change in circumstances.

Although it would appear that written contracts specifying a clearly defined period of notice for termination without cause may be a useful device for employers to avoid some of the problems of an increased need to terminate employees which *may* arise if mandatory retirement is abolished, they clearly do not provide a total or troublefree solution. Apart from the obvious care which must be taken by employers in using them, there may be other difficulties. They will not protect employers from age discrimination claims under the *Ontario Human Rights Code* if they are either used or enforced in relation to older employees and it can be shown that the age of the employee was a consideration in their use or enforcement. Thus, employers will have to be very cautious about their use to terminate the employment relationship of older employees. However, if employers become sufficiently concerned about the number of older less competent employees who might present difficulties by trying to stay on that they decide to try to cull their work force of less competent employees at a earlier stage of the working cycle, they may find written notice provisions to be a helpful device, if used properly.

However, one could question the desirability of the development of such practices. Despite the finding in *Wallace* that a finding of unconscionability could not be made on the basis of inequality of bargaining power at the time of hiring, one can certainly question the assumption that there is not substantial inequality of bargaining power for most employees at the time of formation of the contract, and for many employees, throughout their period of employment with one employer. Therefore, to enforce such notice periods where the employee has not risen in job status over a lengthy period of service or has risen in status but has had his contract updated by amendments, may, in many cases, allow employer's to use their substantial bargaining power to undermine the basic policy reason for the development of the requirement of *reasonable* notice at common law: to protect blameless employees from significant economic insecurity and hardship that ensues from sudden termination of employment due to the whims, needs or failures of the employer.

Perverse Incentives Problem

It is difficult to predict the extent to which employers may be able to deal with some of the problems of terminating older workers through the use of effective "buy out" or settlement strategies. It is likely that the significant increase in termination and unjust dismissal claims in recent years, brought on by the downturn in economic conditions, corporate reorganization, technological change and the changing needs of the labour market in terms of job skills, has already led many employers, with the assistance of specialist advice, to develop effective buy–out and settlement strategies to avoid costly wrongful dismissal actions. Recent caselaw extending the reasonable notice period for senior long service employees, in some cases to periods as long as 24 or 30 months, has no doubt provided added incentive to employers to develop attractive and effective buy–outs for their most senior and long service employees.

There are, however, problems associated with buy–outs, apart from obvious economic costs. If employers announce an attractive general buy–out policy for all employees of a certain age, they run the risk of losing the most productive employees they would like to see stay on as well as those who are less desirable. In addition, some economists have speculated that if the employer is precluded from relying on a compulsory retirement policy to terminate older

less desirable workers, given the law of wrongful dismissal and the damages which an employee can receive if terminated without cause, there will be a "perverse" incentive for those workers who would otherwise have voluntarily retired, to stay on simply to obtain a buy–out from the employer. Gunderson has even gone so far as to speculate that, to the extent that the amount of the buy–out may be related to the difference between the individual worker's salary and productivity (i.e. employers will pay more to get rid of less productive employees), there may even be a perverse incentive for older employees to reduce their productivity to increase the amount of the buy–out. The caselaw which seems to require that employers establish a more serious case of incompetence to prove just cause in relation to senior long service employees may even buttress this perverse incentive to some extent.

It is impossible to predict with any certainty the extent to which the perverse incentive problem would become a significant problem if mandatory retirement were abolished. However, there are three points which may undermine its potential significance.

First, there is the converse of perverse incentives should mandatory retirement be abolished and that is the perverse incentives which may exist now because of mandatory retirement. To the extent that employers do actually carry incompetent older workers to a compulsory retirement age and courts presently do make it more difficult to discharge older workers for incompetence, there may be at present a perverse incentive, in workplaces with fixed retirement policies, for older workers to reduce their productivity during the later years of employment and to fulfill the "wobbly senior" prophecy. If the senior employee knows he must retire at a fixed age in the near future and there is little prospect of further promotion or increased responsibility near the end of his working life, he has little reason, other than personal pride or peer pressure, to continue being highly productive. And we cannot discount the possibility that a significant perverse incentive currently exists for older employees, at least for those with some sophistication concerning the law of wrongful dismissal, to actually decrease productivity (short of providing evidence of serious incompetence), to try to obtain a favourable buy–out during their later years of work. We make no claim to the pervasiveness of this perverse incentive or that it is not based on conjecture. But is it any more conjectural than the perverse incentive conjured up by the abolition of mandatory retirement?

Second, there may be the potential for the current principles of the common law of wrongful dismissal to deal with employees who are clearly acting on the perverse incentive alleged as a likely consequence of the mandatory retirement's elimination, particularly if the employer is able to provide some cogent evidence that the employee was acting on such incentives and had no desire to continue working in the future. The rationale behind the reasonable notice requirement at common law is to provide the employee with an opportunity to seek alternative comparative employment. In an action for wrongful dismissal the common law imposes a duty on the employee to mitigate his damages by seeking alternative employment following termination. Thus, if the employer could establish that the perverse incentive employee had no intention of continuing to work there could be an argument that the period of reasonable notice should be minimal. It must be admitted, however, that in most cases the employee with the sophistication to act on the perverse incentive is also likely to be sophisticated enough to not provide evidence of lack of desire to continue working and to make enough of a surface effort to seek alternative employment to satisfy his duty of mitigation.

Third, to the extent that the employee may be susceptible to discharge for incompetence and more stringent performance monitoring and appraisal to jusify termination for cause in the absence of compulsory retirement, the perverse incentive to stay on while performing less competently may be undermined.

Greater Monitoring and Performance Appraisals of Employees

One of the greatest concerns frequently expressed, by both labour and management, is that the abolition of mandatory retirement will require management to impose more stringent monitoring and appraisal systems on older employees as a consequence of a greater need to terminate such employees for cause to sever the

employment relationship. There is a fear that greater monitoring and appraisal of older employees' performance will represent significant undesirable costs, both in economic and human terms, as the employer will be required to impose costly evaluation procedures and older employees will suffer the indignity of closer scrutiny and assessment. In addition, it is speculated that employers will be forced to implement systems for closer scrutiny of performance for all employees, both to avoid age discrimination complaints in relation to testing itself, and to enable them to remove less competent workers from their work force at an earlier age to avoid the problems of age discrimination complaints and unjust dismissal claims that are peculiar to the termination of older workers.

Two aspects of this potential problem as a consequence of the abolition of mandatory retirement will be discussed here:

(a) The extent to which it is a problem which is likely to result from abolition of compulsory retirement in actual practice.

(b) The legal issues surrounding the use of performance appraisal systems and any impediments to their implementation.

Increased Performance Monitoring a Likely Consequence of Abolition?

The extent to which the abolition of mandatory retirement itself is likely to lead to increased monitoring and appraisal of older workers or workers in general is uncertain. However, there are several factors which can be identified as likely to have a bearing on this issue.

This argument would appear to be based on three premises or assumptions: (1) employers with fixed retirement ages currently do carry less productive older employees to retirement age; (2) employers currently do not have adequate monitoring and appraisal systems in place; and (3) employers will be faced with a significant number of older less productive employees who choose to stay on past normal retirement age. The likelihood of the abolition of compulsory retirement causing the need for greater monitoring and appraisal of employees is likely to be undermined to the extent these assumptions are not valid.

There is some evidence to suggest that employers do carry less productive older workers to retirement. A 1980 survey by the Conference Board of Canada revealed that two–thirds of employers surveyed felt they had some difficulty releasing less productive workers and 49 percent of such employers reported that they take a paternalistic attitude toward their long term employees and carry them to retirement, in some cases by redesigning their jobs to fit their abilities. However, there is also evidence, from the same study, which suggests that the number of older workers who are less productive and being carried to retirement is not large.

With regard to the second assumption concerning the present use of adequate and continual performance appraisals systems, there is evidence suggesting that regular (at least annually) performance appraisal systems are quite prevalent for professional and management employees (82 percent) but are seldom used for unionized or hourly–rated employees. This observation can be explained in part by the fact that a blue collar worker's productivity can often be easily assessed by the level of visible output of tangible products and the difficulty employers may face in imposing continual monitoring or appraisal procedures on organized employees. This observation is also supported by a relative dearth of arbitral jurisprudence in which regular formalized performance appraisals have been raised in evidence.

However, while there is evidence suggesting that performance appraisal systems are prevalent for managerial and professional employees, there is also a great deal of conjecture that systems presently in use are not adequate or properly administered. The 1982 *Report of the Commission on Mandatory Retirement in Manitoba* by Commissioner Rothstein noted the following common weaknesses of appraisal processes:

(1) very subjective appraisals by superiors or supervisors which do not reflect the honest objective opinions of the supervisors or use inappropriate criteria;

(2) inadequate training of superiors to properly conduct appraisals;

(3) the application of appraisals too late in the employee's career;

(4) poor feedback to the employee as to how he is perceived to be performing.

Rothstein concluded that appraisal systems in place likely were inadequate, but concluded that the solution was better appraisal systems and not compulsory retirement.

It should also be noted that in recent years, largely in response to a significant increase in unjust dismissal litigation in Canada, specialist counsel have been advising employers to implement proper systems of performance review to enable them to better prepare for terminations for cause. A proper performance review should be done regularly, annually or more frequently, and should provide a written assessment based on relevant and objective criteria. The written evaluation should be completed objectively by a supervisor properly trained to administer the appraisal, who should discuss the evaluation results with the employee. It has been suggested that management counsel will also often advise employers to give incompetent performers a rating in the worst category on the scale to better prepare for the establishment of just cause should the need to terminate the employee arise.

Because employers have been strongly advised for some time to implement meaningful and effective performance review systems for all employees, due to problems confronted in proving just cause, it becomes even more difficult to predict the extent to which performance appraisals would actually increase as a consequence of the abolition of mandatory retirement. However, one can speculate that there will only be an increase in the existing incentive for employers to implement performance appraisal systems to the extent that employers actually do come to face the prospect of a significant increase in the need to terminate for cause older less competent workers who decide to stay on in the work force. If there is not a significant increase in the number of such workers, there should be no greater incentive to increase performance appraisal systems beyond what exists at present due to the principles applicable to actions or arbitrations for unjust dismissal.

While it is impossible to predict with any certainty the number of less competent older workers who might choose to stay on with employers beyond the present "normal" retirement date, there is some evidence to suggest the number would not be significant. In a major study done for the Conference Board of Canada, the author predicted that in a firm of 5,000 employees, only about 10 individuals would retire as late as age 65 and only about 5 workers would be likely to continue to work if mandatory retirement was abolished. Of this small number of employees who would want to continue working past 65 it is impossible to predict what proportion would be less productive, and therefore candidates for termination for cause. However, the small numbers suggest that while there may be difficulties with individual employees the total number is unlikely to cause significant personnel problems which are sufficient to motivate a serious change in personnel management practices.

The evidence provided to the Task Force on this issue from other jurisdictions would seem to support this conjecture. Both the Warrian Report, on the experience in Manitoba and New Brunswick, and the Prevision Report, on the experience in Quebec, report no significant impact on the incidence of terminations for cause or the performance appraisal practices of employers as a consequence of the abolition of mandatory retirement.

However, several economists predict that an increase in performance monitoring and appraisals will be a likely consequence of abolition of mandatory rètirement as employers come to face the uncertainty of indefinite employment relationships with less productive older workers. In addition, there is data to suggest that a majority of employers think they would have to take a tougher attitude toward below–standard performance of all employees if mandatory retirement were abolished. What employers will actually do in practice may, however, be another matter and is likely to be a consequence of actual problems experienced with older less competent employees who decide to stay on longer than they do at present.

Legal Considerations for the Employer in Implementing Monitoring and Appraisal Systems

In the absence of a contractual term to the contrary, there would appear to be no legal impediment to employers imposing more stringent performance monitoring and appraisals

upon employees with whom they have individual employment relationships. Several recent cases have recognized the validity of newly imposed performance appraisals or productivity assessments on relatively long term employees and have given great weight to the results of such evaluations of performance, provided that they set reasonable and relevant standards and are administered fairly. This entails giving the employee clear notice of the standards to be met and a reasonable time frame to meet those standards. Moreover, performance appraisals are merely a form of evidence going to the issue of just cause, and courts review the reasonableness of the appraisals in terms of the standards set, the relevance of the criteria to the position involved, the objectivity of the appraisal method, and the manner in which they were performed, to determine the weight to be given to them. Courts also seem unwilling to find incompetence on the basis of a performance evaluation that falls below the standards set by the employer as acceptable, but not significantly below, especially in the case of long service employees. Of course, a recent positive or acceptable appraisal will generally preclude the court from finding just cause.

The situation with respect to the ability of employers with collective agreements to implement performance evaluations or production requirements is a little less certain. However, it would appear that, in the absence of a collective agreement provision to the contrary or representation by the employer amounting to an estoppel, it is open to management to establish reasonable performance standards and methods of evaluation under the typical reserved management rights provision of a collective agreement. It would also appear that, in the absence of a collective agreement provision to the contrary, arbitrators may be unwilling to entertain a grievance against the content of the appraisal, because of the management rights provision and limitations on an arbitrator's jurisdiction.

However, where management relies on a performance appraisal to defend a grievance against a management decision to demote or discipline, arbitrators are generally prepared to look at the method and content of the appraisal to ensure that it was administered fairly, without bias or discrimination, and met the requirements of relevance and reasonableness. Similar considerations apply in the area of production standards, where it is generally regarded as a management right to set production standards in the absence of contrary provisions in the collective agreement, but if failure to meet them results in discipline, the arbitrator assesses the reasonableness of the standards set by the employer.

Employers in the unionized sector could experience serious legal difficulties in attempting to institute a system of regular medical appraisals to test the fitness of older workers or workers generally. Arbitrators have recognized a right to personal privacy on the part of employees and have held that, in the absence of a contractual obligation or statutory authority, an employer cannot demand that an employee submit to a medical examination, unless he can establish reasonable and probable grounds for suspecting that the employee is unfit to perform to his duties. The issue has usually arisen where an employee returns to work after a period of illness or disability and the employer requires that the employee submit to a medical examination. In the absence of a collective agreement term providing for employer requested examinations, arbitrators have recognized an implicit management right to satisfy itself as to the fitness of its employees to carry out their assigned tasks. But in order to protect the privacy interests of employees, they have insisted that employers can only require such examinations where they present cogent evidence of reasonable and probable grounds for requesting the examination as proof of fitness. The nature of the work and the circumstances in which it must be performed will be relevant considerations in determining whether reasonable and probable grounds for the examination exist. Arbitrators have been especially reluctant to allow employers to require employees to undergo a medical examination by a company chosen doctor, although this may be required where the employer establishes reasonable and probable grounds. Nor have courts or arbitrators been willing to uphold an employer's right to require medical appraisals by a company doctor where the employer is acting under announced company rules establishing this requirement for the entire work force, in the absence of a collective agreement term authorizing the employer to make such rules or reasonable and

probable grounds for requiring the examination for the safety of the employee.

Apart from any questions concerning an employer's legal right to impose performance appraisals systems on unionized employees there are serious practical restraints in a collective bargaining setting. Unionized employees at present are rarely subject to formalized, regular performance appraisal systems. Their introduction in a unionized setting as a consequence of abolition of mandatory retirement could cause significant administrative costs and industrial relations difficulties for unionized employers. As one study on the implications of mandatory retirement noted:

> In view of the concern of employers to avoid the difficulties of selecting certain non-productive employees and releasing them, a change in mandatory retirement policy may induce employers to attempt to introduce appraisal systems for unionized employees in order to be more confident that those small numbers who may continue working past the normal retirement age would be fully productive employees. Such a change would be a basic and very substantial alteration to the current practices followed in dealing with unionized employees.
>
> This is a significant hurdle that companies are reluctant to tackle at present because of its obvious cost implications and the above-noted administrative practices currently in place. In the case of managerial employees where appraisals are customary and already in use, this problem does not emerge.

In the event that employers attempt to introduce performance appraisal systems in a unionized work force, unions are likely to insist that constraints and regulations concerning their administration and use be incorporated in the collective agreement, if they are not able to negotiate their total removal. In that event, employers could face a number of grievances concerning the performance appraisals themselves. This may be a legitimate development to ensure that an appropriate balancing of employer-employee interests is struck: on the one hand the employer's interest in a competent and productive work force and, on the other, the employee's interest in being evaluated in a fair, relevant and reasonable manner.

Therefore, when the overall cost implications and industrial relations difficulties which may be associated with an increase in performance appraisal systems in the unionized sector are considered, many employers are likely to be discouraged from implementing them unless there is a significant number of older less competent workers who decide to work on past present normal retirement ages in the absence of mandatory retirement.

The B.F.O.Q. Exemption: A Limited Exception

The *Ontario Human Rights Code*, and age discrimination legislation in most other jurisdictions, allows employers to discriminate on the basis of age in employment if the discrimination is the result of a reasonable and *bona fide* occupational qualification or requirement (B.F.O.Q.). Thus an employer's mandatory retirement policy may be upheld in an age discrimination complaint if the employer meets the onus of establishing it as a B.F.O.Q. for the occupation involved. However, courts in both Canada and the U.S. have interpreted this exemption quite narrowly in a fashion which limits its availability to cases involving occupations where a failure in capacity to perform could present a serious threat to public safety (i.e. fire fighters, police officers, bus drivers, airline pilots).

In the leading case on B.F.O.Q.'s in Canada, the Supreme Court of Canada has held that an employer must meet a double-barrelled test to establish age as a B.F.O.Q. First, the employer must meet a subjective test by showing that the retirement age was established honestly and in the sincere belief that it is in the interests of adequate performance of the job with reasonable safety and economy. Second, the employer must satisfy the objective test of showing that the fixed age for retirement is "related in an objective sense to the performance of the employment concerned, in that it is reasonably *necessary* to assume the efficient and economical performance of the job without endangering the employee, his fellow employees and the general public."

Implicit in this objective requirement, is the requirement that the employer show that it was not reasonably practicable to ensure safe performance of duties by other means such as individual testing of the physicial condition of employees. And the Court noted that an employer was not likely to satisfy the burden of

proving age as a B.F.O.Q. without presenting some statistical or scientific evidence of the effect of aging on the ability to perform the duties of the particular job at issue.

The availability of the B.F.O.Q. exemption has been further narrowed in recent decisions which have held that the question of the validity of a B.F.O.Q. must be determined in relation to the kind of duties required for the particular position held by the complainant employee, and not on the basis of the general duties performed by the more general occupational group to which the complainant belongs.

In general, although the B.F.O.Q. exemption may take on added significance as a result of the abolition of mandatory retirement, it is likely to be available for a very limited number of occupations in which unfitness may present a threat to public safety. This being the case, it is likely to have little impact on concerns with respect to an increased need to terminate older workers for cause as a result of abolition of mandatory retirement.

Special Problems with Respect to Tenured University Professors

There are some specific occupational groups, for which the B.F.O.Q. exemption is inappropriate, for which it is claimed the abolition of mandatory retirement will have far more serious detrimental effects on personnel management than those which might occur in the general work force. The group which has received a great deal of attention in Canada recently because of some high profile *Charter* challenges to mandatory retirement, is university professors.

The concerns that abolition of mandatory retirement could have a serious adverse impact on the personnel management needs of universities are well known, in part because of the *Charter* litigation referred to, and in part because of the decision by the U.S. Congress to provide a temporary exemption for university professors in both its 1978 raising of the age limit for age discrimination complaints to 70 and its 1986 amendments abolishing mandatory retirement. The concerns are as follows:

(1) University professors are an occupational group in which a larger percentage of employees are likely to want to keep working beyond present retirement ages, both because their work has significant non–monetary rewards and because it is not physically demanding. Thus, poor health and economic security, the major reasons for early retirement, may not be as significant for university professors.

(2) Unlike other employers, due to limited financial resources, universities have a relatively fixed number of positions to fill. Therefore, if significant numbers of professors stay on this could substantially reduce the availability of faculty positions for younger new faculty members.

(3) Reduction in the ability to hire new faculty will impede universities from hiring underepresented groups such as women and visible minorities.

(4) At present tenured university professors enjoy very great security of employment because they are practically impossible to dismiss and there is very little monitoring or appraisal of tenured professors' performance. If mandatory retirement is abolished, the concept of tenure, traditionally viewed as necessary to protect academic freedom, may be questioned and could be threatened.

(5) Additionally, in order to enable universities to discharge incompetent tenured professors for cause, greater monitoring and appraisal of tenured professors could ensue. There may even be a need for an alternative dismissal procedure.

(6) The slowing of new blood for the university professoriate, in the form of new faculty members, could be detrimental to the intellectual well being and research capacities of university faculties.

These concerns caused the American Association of University Professors to advocate an exemption for professors from the abolition of mandatory retirement and were considered by Congress to be serious enough to justify a seven year exemption from the general abolition of mandatory retirement in the 1986 amendments to the *ADEA*, with a requirement for further study of the problem during the following five years. However, the Canadian Association of University Teachers has taken the contrary position, in supporting the *Charter* challenges

referred to above, and in a brief to this Task Force.

Although there is, to this point, little empirical evidence concerning the number of senior professors who will choose to stay on past the "normal" retirement age, there is some evidence from other jurisdictions that the numbers could be substantial. Experience in Manitoba to date reveals that approximately two–thirds of senior faculty are staying on past 65 at the University of Manitoba (about 40 per year) and two–thirds of those who do stay on are staying for more than two years. Evidence from Quebec suggests that significant numbers of senior professors in universities in that province are staying on as well. Evidence from a U.S. study on the effect on universities of the raising of the mandatory retirement age from 65 to 70 suggests that it could reduce new hirings of faculty members by 25 percent.

However, while it is probably the case that if a significant number of senior professors stay on in the absence of mandatory retirement it will reduce hiring opportunities for new faculty members and this may in turn cause universities to consider more terminations for cause of tenured professors, it is simply not the case that universities do not already have dismissal for cause procedures and regular performance evaluation procedures in place for tenured professors.

Common opinion often views tenure as a legal concept that virtually guarantees life employment. However, the actual effect of tenure, in terms of employment security, will be determined by the collective agreement for organized universities and the terms of individual contracts of employment and university regulations for non–organized universities. In addition, there are many universities in Canada where the Faculty Association is not certified and does not want to be voluntarily recognized as a union, but the Faculty Association and the administration in fact bargain collectively and establish rules for the work force in the form of a "special plan". The vast majority of university professors work under collective agreements or special plans. In general, tenure for university professors is a right to indefinite employment (until the specified retirement age where mandatory retirement is allowed) subject to the right of the employer to dismiss for just cause or to terminate for reasons of financial exigency or programme redundancy in accordance with the terms of the collective agreement, special plan or individual employment contract. While arbitration concerning disputes over termination for cause is a legal requirement in the collective agreement context, it is also commonly provided for in special plan arrangements.

In many university agreements there is simply a general "just cause" for discipline or discharge provision, leaving it open to employers and arbitrators to apply the general criteria for just cause developed in the general arbitral jurisprudence. This will, of course, allow employers to terminate tenured professors for incompetence. But there are some agreements which specifically define cause in a fashion which gives it "a relatively high content as a basis for the removal of tenure." Definitions of just cause for disciplinary measures, including discharge, in two university collective agreements which were recently in force included the following:

(1) ...failure to maintain an acceptable standard of competence and performance in duties appropriate to the appointment...

(2) ...incompetence of the professor or to his unfitness to maintain appropriate level of quality relative to his participation in the general work of the university.

It is also inaccurate to suggest that tenured professors do not experience any form of regular periodic performance appraisals. Many universities, either under collective agreements, special plans or university regulation, have mechanisms for annual performance evaluation of all professors for the purpose of determining entitlement to progress through the ranks (PTR) pay increments or merit pay. This usually involves an assessment of teaching evaluations, research activities and university administrative service activities for the period under review. Under the University of Ottawa agreement, negative appraisals leading to denial of PTR are subject to the grievance and arbitration procedure and two successive negative performance evaluations can provide the basis for dismissal proceedings. This procedure has been used in the past to discharge successfully at least one faculty member at the University of Ottawa.

Thus, although anectodal evidence suggests that the number of dismissals for cause of tenured professors is small, they are subject to the employer's right to terminate for incompetence, and there are procedures and mechanisms in place for the resolution of such disputes. And tenured professors do generally undergo periodic appraisals of their performance.

Implications for Seniority Rights

The evidence that mandatory retirement is prevalent in collective bargaining relationships suggests that it forms an integral part of the bargain concerning terms and conditions of employment agreed to by management and unions and its removal may have serious impacts on other aspects of the bargain. Several economists have suggested that the widespread recognition of seniority as an operative principle in vital decisions concerning job status and security could be seriously questioned and altered as employers face the prospect of indefinite employment relationships with less productive senior workers.

Seniority rights currently accrue to workers on the basis of length of service and are usually recognized as an essential, if not the predominant criterion for decision–making concerning promotions, layoffs, bumping rights and recalls. The extent to which seniority will actually be determinative depends on the language of the collective agreement and it is common to find strong or weak seniority provisions pertaining to fundamental job status decisions.

The argument that abolition of mandatory retirement will lead to an undermining of seniority rights has been succinctly stated as follows:

> Seniority rights and privileges accrue to older workers in recognition of their greater skill and knowledge accumulated over the years. However, the use of seniority also assumes a finite term to the work relationship as it is not expected that senior workers will continue to learn or be high performers indefinitely. Some point must be reached where capacity for learning or continued high performance must diminish or where skills and methods previously learned have become obsolete. In this case it is no longer equitable to accumulate increased seniority rights within the organization, as the underlying assumptions no longer hold true.
>
> With mandatory retirement, it is not necessary to challenge the assumptions of seniority because most employees retire before the point of diminished capacity occurs, or their diminished capacity will be tolerated for the time remaining until retirement.
>
> If mandatory retirement were not permitted, seniority rights would have to be modified or adjusted for the actual skill, knowledge or performance levels of older workers.

These forecasts revolve around an assumption that there will indeed be a substantial increase in unproductive older workers and there are two responses. First, to the extent there is not a substantial increase in older workers continuing past the present retirement age, employers will have no additional incentive beyond what exists at present to give less weight to seniority in fundamental decisions affecting employment security. Experience from jurisdictions where mandatory retirement has been eliminated indicates that few senior employees elect to continue and, consistent with this, there seems to be no evidence of any major changes in seniority provisions. One brief exception was described in the Warrian Study done for the Task Force. A collective agreement in Manitoba was altered to end the accumulation of seniority rights once an employee had reach 65 years of age. However, that alteration was shortly thereafter deleted. The Quebec Study done for the Task Force mentioned one instance of a seniority provision changing but no details were provided.

A second response involves assuming that over time many older employees would elect to continue. Again, a distinction has to be drawn between productive and unproductive workers. To the extent the older worker is productive it is open to serious question why he should not be allowed to continue to take the benefits of seniority, a benefit that any worker can eventually have if he or she elects to continue to work. On the other hand, if the worker is unproductive (thus giving rise to legitimate concerns) there are two points to make. First, the force of seniority clauses vary. A seniority clause which indicates that all other things being equal a senior employee is to have the position will not benefit a weak senior employee because, by definition, he will not be equal. Thus there are means even now to adjust the meaning of seniority to respond to such problems if they develop. Second, to the extent that an employee

is truly unproductive or incompetent, the question may not be whether he will be availing himself of seniority but whether he will be demoted or eliminated once these inadequacies are established.

Conclusion

In this part, we have tried to examine the alleged consequences of the abolition of mandatory retirement, for employer–employee relations and personnel management practices, with a particular emphasis on problems associated with terminating the employment relationship in the absence of mandatory retirement. In particular, we have looked at the suggested consequences of increased termination for cause, increased monitoring and appraisal of employees, and the questioning of seniority as an important criterion in decisions concerning job security and status.

In general, one must conclude that it is uncertain to what extent, if at all, these consequences will occur. The evidence from other jurisdictions suggests that in the short term there will be very few employees who choose to stay on in the absence of compulsory retirement and there will be very little impact on the personnel practices considered herein. Even if one accepts the conjecture that in the long term, "a worst scenario" of many employees staying on will develop, one must still distinguish between the number of productive senior employees who stay on as opposed to the number of unproductive senior employees who continue in employment. To the extent that senior employees only stay on past present retirement ages as long as they are productive, we fail to discern a legitimate basis or motivation for concern with present personnel practices. To the extent unproductive senior employees who chose to stay on may present a problem, we have attempted to suggest some responses other than terminations for cause which may lessen the problems identified. However, we recognize that some of the suggested employer responses present problems of their own, and none of the suggested responses provide a complete answer to the potential effects of the abolition of mandatory retirement which may develop in the long term.

Our general conclusion is that there is no solid basis for suggesting that any of the alleged consequences would occur, or at least to the extent alleged by these who contend that the abolition of mandatory retirement could cause a fundamental change in personnel management practices. Further, we conclude that even where the alleged consequences do occur, there are legitimate responses which could be taken to lessen their impact on personnel management functions. Nonetheless, it is apparent that the abolition of mandatory retirement will inject some overall uncertainty into employment relationship with the *potential* for significant untoward effects.

7

Ramifications for Personnel and Human Resources Planning and Practice and for Employer/ Employee Relationships

Introduction

The literature on mandatory retirement distinguishes several reasons for its existence:

(1) work sharing, especially to open up jobs for youths;

(2) facilitate planning and certainty for both employers and employees;

(3) minimize the need for monitoring and appraisals of older workers; and

(4) facilitate deferred wage compensation systems;

Each of these rationales will be examined in turn, emphasizing their strengths and weaknesses.

Work Sharing and Opening Jobs for Youths

Mandatory retirement has been rationalized as a device to free up jobs for others, especially younger workers. This need not occur in the form of a younger worker taking the job vacated by an older worker who retires. Rather it would more likely occur in the form of an older worker vacating a job that creates a vacuum effect, drawing up others who are promoted to a higher level and who thereby create new vacancies for younger workers at the lower levels. This procedure has the virtue of creating new jobs at the bottom and promotion opportunities throughout the hierarchy. This in turn enables an infusion of new skills, ideas and talents at the various levels.

For further reference: Morley Gunderson, *Effect of Banning Mandatory Retirement on Industrial Relations Functions,* a report commissioned by the Task Force.

Because of their acute concerns over their high levels of youth unemployment, most European countries have emphasized various forms of work sharing such as the reduced workweek and earlier retirement policies. In fact this emphasis on early retirement as a form of work sharing has basically meant that the mandatory retirement debate has not been anywhere near as intensive in Europe as in North America. At a time when they are trying to encourage early retirement to create jobs, there is simply less social and political pressure to ban mandatory retirement. This is augmented by the fact that, having not experienced the civil rights issues of the 1960's, European countries do not appear to be under the same pressure as North America, to deal with issues of discrimination, of which age discrimination may be a part.

To minimize the possibility that mandatory retirement as a form of work sharing will be compounded with age discrimination, some supporters of mandatory retirement have argued that it be related to work experience and not age. For example, it has been argued that, given the persistent high unemployment that prevails, the scarce jobs may have to be shared on the basis of some rule like mandatory retirement after a certain number of years at the job. This would give others a turn at those jobs. Taking turns after having had the job for a specified number of years would not be strictly age related and it would create turns for those, like women, who because of family responsibilities tend not to accumulate continuous experience at a particular job.

Economists have concerns over such allocation procedures that are based on administrative rules and not market mechanisms. More generally, however, they have concern over work sharing rules that assume there are a fixed number of jobs in the economy. Such an assumption — termed the "lump of labour fallacy" — basically ignores the fact that when people take on a job (or remain in the job rather than retiring) this has other effects on the economy. For example, their additional income means more spending which in turn creates jobs. Or their presence can exert downward pressure on wages which in turn can enhance employment prospects. Or their

presence may reduce skill bottlenecks, and this in turn can increase complementary jobs. In essence, economists tend to emphasize that there are not a fixed number of jobs in the economy and that people participating in the labour market can also create jobs.

Situations may exist in which a particular job is not open until the incumbent retires. This may occur in sectors where new jobs are not being created at a rapid rate although new potential recruits have specialized training for that sector. For example, in universities "new slots" for the hiring of junior faculty can be specifically tied to the retirement of a particular faculty member. In particular establishments, early retirement programs can prevent layoffs or open up new jobs. If downsizing in auto or steel occurs, its effects can be mitigated by early retirements. This is one of the reasons that blue–collar unions tend to support mandatory retirement.

It is also the case that in the short run, in periods of unusually high unemployment, the economy may be best characterized as having a scarce number of jobs and that work sharing programs may help alleviate unemployment. This is the rationale, for example, behind the unemployment insurance assisted work sharing program in Canada where workers under approved work sharing programs are eligible for unemployment insurance for those days they do not work. It is also the rationale, rightly or wrongly, for restricting immigration in periods of high unemployment. It may also be the rationale for the heavy European emphasis on work time reduction as a form of work sharing, given their high youth unemployment and slow rate of new job creation.

Society generally tends to sanction voluntary work sharing programs such as early retirement, unemployment insurance assisted work sharing and unpaid leaves. There is also considerable public support — rightly or wrongly — for other involuntary forms of work sharing such as restrictions on immigration and restrictions on overtime work. Where mandatory retirement fits into this spectrum is difficult to tell since it is a voluntary contractual arrangement when entered into, although it can require one to retire involuntarily when the mandatory retirement age occurs.

Even if there is a rationale for work sharing policies, there may be concern over policies that provide for work sharing on the basis of personal characteristics like age. There is a general belief that public policy ought not to restrict women from entering the labour market on the ground that they could "take the job of a man". Would not similar logic dictate that public policy ought not to sanction mandatory retirement because older workers may be occupying a job that could be done by a younger worker? There may be some consolation to the fact that age is an identifiable characteristic that is common to everyone and hence that work sharing based on age may be socially more acceptable than that based on sex. Nevertheless, age–based work sharing certainly may be perceived as discriminatory.

In summary, care should be taken in rationalizing mandatory retirement as a form of work sharing to open up jobs for younger workers. Such logic could be subject to the lump–of–labour fallacy and it could be interpreted as age–based discrimination. At best, the work sharing rationale may be appropriate for particular sectors (but not for the economy as a whole) and it may have some force as a short–run policy to lessen (share?) the impact of unemployment. These latter two points, respectively, suggest that policy consideration be given to exempting certain sectors, at least for a period of time, where work sharing may be important, and to banning mandatory retirement (if it is to be banned) in a period of low unemployment so that the economy can absorb those who remain in the labour force.

Facilitate Planning and Provide Certainty

Mandatory retirement as a personnel policy may exist because it can facilitate planning and provide a degree of certainty for both employers and employees. With mandatory retirement employers have a fixed termination date around which they can plan for such things as renewals, training and pension obligations. Certain payments like disability and medical insurance can become particularly difficult to forecast because they are likely to increase with age, and yet without mandatory retirement there will be

increased uncertainty as to whether older workers will remain with the company, and if so, for how long. These planning problems may be particularly difficult for specific sectors. University departments, for example, may find it particularly difficult to plan for faculty renewals if they are uncertain as to when particular members will retire.

For employees, mandatory retirement also provides a fixed date around which they can plan for such factors as saving for retirement, arranging part–time work or even planning for a geographic move. They can also partake in retirement planning programs that are often sponsored by their employers. Without a fixed retirement date they may be poorly prepared to deal with an ultimate retirement decision that may be forced on them by ill health, difficulty in carrying out their job, or even possibly dismissal. Their problems may be compounded if, as discussed subsequently, the elimination of mandatory retirement may lead to more monitoring and dismissals of older workers, as well as the possible dissipation of public and employer sponsored pensions. Human nature is such that we often do not plan for events until they are forced on us; in the case of retirement the consequences could be quite severe.

While a mandatory retirement date can facilitate planning and provide a degree of certainty, it is also the case that personnel policies ought not to jeopardize the human rights of older workers simply because it makes it more convenient for employers to plan their budgets and human resource policies. In addition, retirement decisions can be predicted in a probabilistic fashion and large organizations at least should have a reasonably accurate forecast of their retirement flows. As well, uncertainty is inherent in running an organization and it is an inevitable part of various dimensions of human resource planning. The uncertainty associated with retirement decisions is likely to be much smaller than the uncertainty emanating from absenteeism, turnover, strikes or simply the ability to carry out a job. After all there is certainty about *who* the person is who may retire, while this is not the case for such factors as absenteeism or quits.

With respect to facilitating the planning decision of employees themselves, it is somewhat paternalistic to set a retirement date for people because they cannot properly plan for it otherwise. This may be a reality in many circumstances, but it is hazardous to base public policy on such presumptions except for unusual circumstances.

In fact, the argument is often advanced the other way. Mandatory retirement is often criticized because people have not properly planned for retirement or saved sufficiently, and hence when mandatory retirement comes they are not prepared sufficiently. They may have even agreed to mandatory retirement earlier as part of their terms of employment; however, that was because they were myopic and discounted the future by too much. As they approach the normal retirement age and the mandatory retirement constraint becomes binding, they have a clearer picture of the consequences of retiring and hence would prefer to recontract from their earlier contractual arrangement.

Again, however, except in extreme circumstances, it is hazardous to base public policy initiatives on the presumption that people do not know what is best for themselves. This is especially the case in situations of strong collective bargaining power (where mandatory retirement is prominent). Here it is more reasonable to assume that unions are reasonably informed about retirement conditions and that their pros and cons are reasonably considered in their internal union trade–offs and bargaining outcomes.

Minimize Monitoring Appraisal and Dismissal of Older Workers

Mandatory retirement also has been rationalized on the grounds that it can minimize the need to monitor and appraise the performance of older workers. Knowing that an older worker may be with them only for a fixed period of time, employers may be willing to "carry" that worker until the retirement age, knowing the maximum extent of their losses. Even if the worker's productivity falls off, employers may still grant normal wage increases, rather than appearing

mean spirited with respect to their older employees. Similarly, co–workers in work groups may be willing to assist older workers, knowing that they are approaching the retirement age; the younger workers recognize that they also may be in that situation some day.

This argument does not assume that the productivity of workers declines with age and that employers and co–workers must "carry" older workers. Rather, it assumes simply that the productivity of some older workers will change such that, if they were younger, corrective action would likely be taken in such forms as job reassignment, or even dismissal. It may even be the case that the variance of productivity will increase with age, in that some older persons are more likely to experience disability or health related problems that are related to their age. With a fixed retirement date, these people are likely to be "carried" to their retirement age, especially if their pension accruals depend on their final years' earnings.

In contrast, if mandatory retirement is banned, there is less likelihood that such older workers would be so assisted, given the uncertainty as to how long that assistance would be required. Ultimately, employers will have to plan for the possibility of having to dismiss an older worker whose competence has failed. This will mean more monitoring and assessment of such workers for employers to defend against possible wrongful dismissal cases through the courts, unjust dismissal proceedings through statutory employment standards provisions (in some jurisdictions), or possibly age discrimination charges. The threat of age discrimination changes may also prevent employers from adjusting the wages of older workers whose productivity has declined.

Mandatory retirement has also been rationalized on the grounds that it enables older workers to "retire with dignity" in that they retired because of a common personnel rule that applied to themselves and their peers. In contrast, if mandatory retirement is banned there may be a social stigma to retirement because it may be taken as a sign of an inability of the employee to do the work or a rejection or even dismissal by the employer. The dignity of older workers may also be jeopardized by the increased monitoring and evaluation they are likely to face if mandatory retirement is banned.

It is difficult to assess the relative importance of the possibility of reduced monitoring, appraisals and even dismissals of older workers under a system of mandatory retirement. Such possibilities are there for workers of all ages; they may even not be as necessary for older workers because there is already an accumulation of experience with their performance. Besides, it does not seem sensible to uniformly retire people because it may be difficult or awkward to monitor their performance or possibly even have to dismiss a few. Requiring mandatory retirement seems an overreaction to simply avoid the complexities and unpleasantries of evaluating and possibly having to terminate older workers.

Facilitating a Deferred Wage Compensation System

It has been argued that mandatory retirement may exist to facilitate the existence of deferred compensation. Such a compensation system involves the deferral or back loading of a portion of worker's compensation. Such workers are "underpaid" (relative to their productivity) when young and "overpaid" when older, the equilibrium condition being that the expected present value of compensation equals the expected present value of the worker's productivity at the firm. Obviously such an arrangement can only exist in reasonably long–term employment relationships (what economists term the contract market as opposed to the spot or auction market). Otherwise there is an incentive for the firm to lay off the worker at the point in time when compensation begins to exceed productivity.

Under a deferred wage compensation system, mandatory retirement is necessary to provide a termination date to that particular contractual arrangement. Otherwise such an arrangement could not exist because compensation would exceed productivity for an indefinite period. This also reminds us that mandatory retirement simply says that a particular contractual arrangement is terminated. Employees can make other arrangements with other employers or sometimes with their former employer, on a different

contractual arrangement, presumably where wages are equal to productivity. This can be one of the reasons why wages would likely be lower under the new contractual arrangement. It is not because the productivity of older workers drops dramatically at that time; rather, they are simply not receiving their deferred wages.

Deferred wages can exist for a variety of reasons. Employers may prefer deferred wages because they encourage work effort and honesty on the part of employees. They are akin to the worker "posting a bond", held by the employer, and repaid conditional on satisfactory performance. That is, the worker has a stronger incentive to perform, knowing that satisfactory performance means staying with the establishment and receiving substantial wage increases associated with seniority.

There are other rationales for deferred compensation. Because workers have an incentive to stay with the firm to receive the deferred compensation, this deters unwanted turnover and enables the firm to amortize its fixed hiring and training costs over a longer period. In essence, it enables the firm to "invest" in its employees knowing that they are more likely to stay with the company to receive their deferred compensations.

Such deferred compensations may also reduce the need for constant monitoring and evaluation of workers, a need that would be there if it were necessary to pay workers a wage commensurate with their productivity at each and every point in time. Rather, under a deferred compensation system only periodic, retrospective evaluation (based on an assessment of past performance) would be necessary and the worker promoted to receive the deferred wage, conditional on acceptable performance. Such periodic, retrospective assessment is less costly and less onerous than a system of continuous monitoring and evaluation.

Deferred compensation also gives the employee a financial interest in the solvency of the firm, since the receipt of the deferred wage obviously is conditional on the firm being able to pay the deferred wage. This in turn may foster a harmony of interest between employees and employers. Deferred wages may also be a form of savings for the employee. This may be important especially if productivity otherwise may decline as the worker gets older; deferred wages would mean that there need not be a corresponding decline in compensation.

Employees may also prefer, or at least willingly accept, deferred wages for a variety of reasons. To the extent that they have the previously discussed positive effects on worker incentives, then worker productivity would be higher and hence so could wages. Some of the higher wage in fact may be a compensating wage paid to compensate workers for the ultimate constraint of mandatory retirement, as well as the possible risk of not receiving the deferred wage. The fact that wages need not decline even if productivity declines has obvious appeal, and there may be a tax advantage to deferring compensation. Employees may also prefer the periodic, retrospective monitoring that may be possible under deferred compensation, as opposed to the more constant monitoring and evaluation that may be necessary if wages were to equal productivity at each and every point in time.

There is obviously some risk that employees may not receive their deferred compensation. In the extreme, employers have an incentive to dismiss workers at the age at which their wage begins to exceed their productivity. While this could occur, there are likely to be a number of checks on such potential abuse. First, such firms would develop a negative reputation and new employees would not agree to accept such a deferred wage compensation system. Second, unions, where present, can ensure that workers have a degree of due process in receiving their deferred compensation; seniority rules are consistent with such protection. Third, since pensions are part of the deferred compensation package, then pension guarantees are a form of guaranteeing the receipt of at least a portion of deferred compensation. Fourth, where the implicit or explicit contractual arrangement is abrogated, severance pay or golden handshakes can be regarded as reimbursement for the loss of deferred wages. Clearly there are various mechanisms whereby workers can reasonably be guaranteed that they will receive their deferred wage entitlements. Yet there obviously are risks. Firms that find themselves with an aging work force, for example, may have an incentive to change the contractual arrangement if they are

downsizing and not hiring new workers for whom they would have to worry about their reputation as a firm that paid its deferred compensation. They may even have an incentive to close down such plants and reopen with a younger work force.

Empirically, there is both direct and indirect evidence suggesting that deferred wages are common. One study concludes the following:

(1) beyond a typically short orientation period, the productivity of older workers with more seniority is about the same as the productivity of younger workers with less seniority, on the same assignments;

(2) wages rise strongly with seniority;

(3) therefore senior workers are paid more than junior workers of the same productivity, and senior workers are paid more than the value of their marginal product while junior workers are paid less than the value of their marginal product. These conclusions are based on studies that utilized objective measures of productivity (e.g., output produced, publications, patents, mail sorted, pages typed, items filed, cards punched) for a variety of different occupations).

There is also indirect evidence supporting the prominence of deferred compensation. Employers often engage in "employee buy outs" or "golden handshakes" involving substantial sums. To some degree, the expected future wage obligations towards such employees must exceed their expected future productivity with the company, or employers might not pay such sums. In fact, the magnitude of the buy out can be taken as a rough measure of the expected difference between compensation and productivity. Further indirect evidences also exists in the fact that when senior employees lose their job because of more terminations or plant closings, they usually take a substantial income loss when displaced to their next best alternative job. If their wage was equal to their productivity then there would not be such a substantial income loss. Presumably at least some of what they are losing is their wages that have been deferred by their company; such wage obligations are not picked up by their new employers where they are paid a wage that is more in line with their current productivity. We should note, however, that income loss after job loss may also reflect lost value of firm–specific skills rather than a wage above marginal productivity in the lost job.

Further evidence of deferred compensation lies in the substantial pension benefit accruals (employer pension obligations) that accrue to workers as they approach the normal retirement age. In representative final earnings plans in Ontario, for example, these accruals commonly are in the neighbourhood of 10 to 30 percent of the employee's wage.

Casual observation also suggests the prevalence of deferred compensation. In universities, for example, where the salaries of senior faculty are typically two to three times the salaries of junior faculty, it is difficult to argue that the senior faculty are two to three times as productive as the junior faculty. This is especially the case in fields where rapid changes in research and methodology make skill obsolescence a possibility.

While there seems to be ample evidence that deferred compensation is prominent, what is less obvious is the extent to which mandatory retirement is necessary to enable such deferred compensation to exist. Periodic bonuses based on acceptable past performance are an alternative. Also, the fact that few people seem to want to continue working past the typical mandatory retirement age, suggests that voluntary retirement may be adequate to terminate most employment relationships. Even if wages may exceed productivity at the company at that time, they may not exceed the value that people attach to their retirement leisure, and hence they retire voluntarily. As indicated previously, however, the extent to which this would continue may change, if mandatory retirement were banned and sufficient time passed for retirement plans to change.

8

Non-discretionary Impacts of Pension Plans and Collective Agreements

Introduction

It can be argued that pension plans and collective agreements that include a mandatory retirement provision do not in fact discriminate on the basis of age. In choosing a job, each individual has the opportunity to examine the pension plan associated with job opportunities. Each individual accepts the job and its accompanying pension plan voluntarily. Many pension plans require retirement at a specified age, usually 65. If an individual accepts a job with such a plan, then the individual has voluntarily agreed to retire at 65.

With such a pension plan, where mandatory retirement has been agreed to voluntarily, no discrimination is involved at age 65. Every employee is treated the same way. The existence of a pension plan provides the employee with the retirement income necessary to plan wisely for retirement financing.

Many people believe that the bargaining unit is the optimal unit for representing the interests and rights of each individual. If the unit negotiates an agreement providing for mandatory retirement, then no individual is being discriminated against. The majority of individuals have voted in each case to accept the agreement, including mandatory retirement. This is a free vote. The individual, in choosing a job, accepts membership in the bargaining unit and agrees to accept its rulings and decisions. This is a voluntary choice connected with acceptance of a job offer. The collective agreement is a contract which legally obliges the employee to retire.

For further reference: James E. Pesando *Employer-Sponsored Pension Plans and Mandatory Retirement*, a report commissioned by the Task Force.

In recent judicial decisions, the above points have been cited as elements in justifying mandatory retirement. In rejecting mandatory retirement in the Vancouver Hospital doctors' case, Chief Justice Taylor emphasized the discretion on the part of the employer. Not all doctors were treated the same. No collective agreement enunciated retirement policy. No pension plan provided a structure for planning retirement finances.

It is quite likely that future judicial decisions will focus on these points in deciding "what is fair and reasonable in a democratic society."

Mandatory Retirement, Collective Agreements and Pensions

Establishing the relationship between mandatory retirement rules, collective agreements and pensions is important for a number of reasons. First, if mandatory retirement is prominent in collective agreements then it is a rule that is often jointly agreed to by labour and management in situations where workers have a reasonable degree of information and bargaining power; it is not simply an arbitrary rule foisted on uninformed and unwilling workers. Second, if mandatory retirement and occupational pension plans go hand-in-hand, this suggests that mandatory retirement may have been accepted by workers in return for other quid pro quos such as pensions, removing one part of that package (i.e., mandatory retirement) may lead to the dissipation of another part of the package (i.e., pensions). Third, if mandatory retirement is prominent in collective agreements and associated with pensions then there is little danger that such workers will be thrust into poverty as a result of a mandatory retirement rule.

In 1979 the Ontario Ministry of Labour analyzed the retirement and pension plan characteristics of major Ontario collective agreements (200 or more employees, constituting about 75 percent of all employees under collective agreements). Approximately 83 percent of these employees were subject to some form of mandatory retirement provision. This percentage is much higher than the overall average of about 50

percent of the total work force that appears to be subject to mandatory retirement. Mandatory retirement is thus disproportionately much more prominent in large establishments where workers are covered by a collective agreement and occupational pension plan. Mandatory retirement is generally not a rule imposed on low wage, unprotected workers in the peripheral, secondary labour market; such workers are likely to be nonunion, with low wages, no pension and no mandatory retirement. Mandatory retirement is commonly the result of collective bargaining with strong unions and hence reflects both employer and employee preferences as well as the internal trade–offs within unions.

The most common form of mandatory retirement found in the analysis required the employee to retire (usually at age 65) but allowed the employee to be rehired (usually until age 70) at the same establishment but under a new contractual arrangement. Automatic retirement, requiring the employee to retire, (usually at age 65 or 68) with no possibility of being rehired, applied to about 24 percent of employees.

Approximately 68 percent of employees had early retirement provisions at their request, and an additional 22 percent had this right if their employers also consented. Most of these plans provided for early retirement after age 55 and 10 years service or age 60 and 10 years of service. Most early retirement provisions involved an actuarial adjustment that is fair in that the present value of the pension benefit does not change because of early retirement.

In summary, mandatory retirement is disproportionately prevalent in the unionized sector and where occupational pension plans are prominent. This means that a legislative ban on mandatory retirement will have a disproportionate effect in the unionized sector and may affect pension plans, which are "twinned" with mandatory retirement.

Where mandatory retirement was present there was also considerable flexibility in allowing "retirees" to work past the usual retirement age; in fact the stereotypical portrayal of automatic retirement at age 65 with no possibility of being rehired prevailed for only 11 percent of employees.

Systematic data on the extent to which persons subject to mandatory retirement are not covered by an occupational pension plan are not available. However, estimates based on fragmentary evidence range from 10 to 14 percent.

Since mandatory retirement is usually part of a collective agreement, agreed on jointly by labour and management, it can be argued that if mandatory retirement is banned as a general principle, then a broad exemption should be allowed for situations where pension plans have been based on a mandatory retirement age, and/or where collective agreements, freely negotiated, provide for a mandatory retirement age. The inclusion of this exemption is likely to reduce significantly the potential impact of a ban on mandatory retirement. In effect, this exemption amounts to "let the market rule" on the merits of mandatory retirement, subject to the single restriction that the employer must provide a pension plan if mandatory retirement is to be used as a personnel policy or included in a collective agreement.

The economic rationale for mandatory retirement focuses on the role of mandatory retirement as an integral part of the set of work rules and compensation policy that govern the work place. The occupational pension plan provides additional support for this economic rationale.

The "Twinning" of Occupational Pension Plans and Mandatory Retirement

Approximately one–half of the workers in Canada are in jobs that are subject to a mandatory retirement provision. When the employee is covered by an occupational pension plan, the likelihood of being subject to a mandatory retirement provision is far higher. Mandatory retirement provisions are quite common in collective agreements, either as part of the agreement itself or as a provision in a pension plan which is subject to a collective agreement. For example, a recent estimate by Labour Canada indicates that approximately 70 percent of collective agreements, covering 500 or more employees, contain pension provisions, and that 95 percent of these pension plan provisions contain mandatory retirement clauses. In other

words, if the employer provides an occupational pension plan (or, in this case, negotiates a plan), the strong likelihood is that the employee will be subject to a mandatory retirement provision.

The Role of the Occupational Pension Plan

The existence of a pension plan supports the economic rationale for mandatory retirement in two distinct ways. First, the existence of a pension plan suggests the likelihood (and certainly the possibility) of an association between the employee and the employer over a substantial portion of the employee's work life. This, in turn, reinforces the observation that one should evaluate mandatory retirement in the context of the set of work rules and compensation policy that affect the employee over the course of his or her work life. Secondly, the pension plan is likely to be an important vehicle through which the deferral of total compensation is likely to take place.

This latter role is especially likely if the employee's pension is linked to the employee's pre–retirement earnings and years of service. The value of the pension benefits earned each year rises sharply with the employee's age and years of service for two reasons: (1) pension benefits become more valuable as the employee nears the age at which they become payable; and (2) wage increases interact with years of service to produce a magnified impact on the pension benefits. If an employee's pension compensation rises sharply with age and years of service, the likelihood is that a portion of the employee's total compensation has been deferred to the employee's later work years.

Consider, in particular, the time path of pension benefit accruals in a final earnings plan which contains no subsidized early or special retirement provision. As noted, there is substantial "back loading" of pension compensation. At age 45, the accrued benefit varies between 1 percent and 12 percent of salary; at age 65, between 36 percent and 90 percent of salary. This evidence on the "back loading" of pension compensation provides strong evidence of the role of the final earnings pension plan as a vehicle for the deferral of compensation. The presence of subsidized early or special retirement provisions provides only one important qualification to this general result. The long–service worker aged 60 or more in a plan with a special retirement provision is likely to accrue negative pension benefits after qualifying for special retirement. The co–existence of mandatory retirement provisions and pension plans thus serves to reinforce the rationale that links mandatory retirement to the existence of deferred compensation.

Why Pension Plan Coverage is Not Universal

There exists no comprehensive study of why pension plans exist in certain establishments or occupations but not in others. The principles of economic analysis, however, draw attention to one possibility: it may not be in the interest of workers in certain establishments or occupations to belong to an occupational pension plan. If an employer provides a pension plan, the cost of the plan is likely to be borne by the *employees*, through appropriate wage concessions. This is the essence of the notion that pension benefits represent deferred wages. If a pension plan exists, workers allocate a fraction of their lifetime earnings to provide for their retirement incomes. This is also true of workers with low lifetime earnings, if they are covered by an occupational pension plan.

Yet it is not clear that workers with low lifetime earnings are better off by being required to join an occupational pension plan. On the one hand, membership in a plan will reduce the likelihood of a future claim by the worker on income–tested programs, such as GIS and the various provincial supplements such as GAINS. On the other hand, as the worker with low lifetime earnings provides a larger share of his or her own retirement income, the support derived by the worker from public pension programs will fall. On balance, the worker with low lifetime earnings may be worse off. For this reason, economists would not expect pension coverage to be high in those occupations or establishments where lifetime earnings tend to be low. In effect, there would be little demand by workers for pension coverage in such situations. A similar argument applies to occupations or establishments where workers are either very young or very mobile. There is likely to be little demand by workers for pension coverage, and

the absence of coverage should be seen in this light.

There is some evidence of lack of demand for pension coverage when income is low. Information from income tax records shows that persons whose earnings are low are less likely to be members of occupational pension plans. Furthermore, low–income Canadians generally choose not to contribute to RRSP's. Given the low value to them of the tax subsidy associated with RRSP contributions, together with the likelihood that they would be substituting their own savings for retirement for benefits available from income–tested public programs, this decision may well be rational.

Further, for workers with low lifetime earnings, the ratio of post–retirement to pre–retirement income is likely to be high, as a consequence of the benefits provided by the C/QPP and OAS. In March 1983, for example, a married couple aged 65 living in Ontario with no entitlement to CPP benefits would receive $6,099 from OAS, $4,720 from GIS and $1,915 from GAINS, for a yearly income of $12,735. If this were a one–earner household, and if that person had earnings equal to one–half of the then average industrial wage (which was about $20,000), the ratio of the post–retirement to the pre–retirement income of this household would be in excess of 125 percent. As previously noted benefits from income–tested public pension programs, the GIS and GAINS, are reduced significantly if the recipient has other sources of retirement income.

One can argue — of course — that there may be advantages for society if individuals have an incentive to be self–reliant, and to provide for their own incomes in retirement. However, if the purpose of public policy is to make workers with low lifetime earnings financially better off, the option of mandatory universal coverage may be counterproductive.

In Conclusion:

If mandatory retirement is banned, there are likely to be "windfall" gains to older workers, as manifested (for example) in individual "buy–outs" by the employer. Such windfalls are likely to be greatest for white collar workers who have above average lifetime earnings.

The presumption of many observers is that the group of employees not covered by a pension plan may suffer disproportionate financial hardship from the existence of mandatory retirement. This presumption *may* be true, but one should also note the following. Workers with low lifetime earnings may be made worse off by being required to join a pension plan. Due to the "tax–back" feature in income–tested programs such as GIS and GAINS, these workers may end up substituting their own pension income for public pension benefits. Income replacement rates through OAS and CPP are, of course, higher for workers with low lifetime earnings.

The introduction of an exemption for employees covered by pensions plans in conjunction with a ban on mandatory retirement is not likely to serve as a strong incentive for employers to establish pension plans where such plans do not already exist. However, this exemption may be useful if the government elects to propose a phase–in ban on mandatory retirement. For example, the government could propose that employers and employees be notified that a ban on mandatory retirement will come into effect in, say, three years. Employers which provide an occupational pension plan could be exempted for, say, an additional three years.

Part 2

Experience In Other Jurisdictions

Contents

9

Manitoba

Introduction

In 1974, the Manitoba legislature passed a series of amendments to the Manitoba Human Rights Act, which resulted in the challenge of compulsory retirement practices as discriminatory on the basis of age. By 1982, various judicial decisions arising out of complaints under the Human Rights Act had effectively abolished "mandatory retirement" in that province. This challenge to current labour practices, however, had not been anticipated prior to the amendment of the Act; in fact, provincial governments of the day resisted a change in practices and even considered further amendments to the legislation which would preserve the environment in which retirement policy had previously operated. A Commission on Compulsory Retirement was appointed to review the issue and in his 1982 report, Commissioner Marshall E. Rothstein declared his support for the view of compulsory retirement as discriminatory on the basis of age.

Little is known about the extent to which compulsory retirement had previously been a constraint on work place participation for older workers; most sources believe the numbers who were involuntarily retired to have been small. Equally difficult to determine is the impact of the limitation of compulsory retirement in terms of the number of persons now postponing their departure from work after the normal age of retirement.

From available information, it appears that the impact of abolishing compulsory retirement in Manitoba has been minimal. No employer or organization claims to have a work force in which more than 1 percent is comprised of workers over the age of 65, and workers in increasing numbers prefer the option of early retirement. Furthermore, few conflicts (either intergenerational or between employers and employees) seem to have arisen. In spite of strongly held views by both opponents and supporters of the practice of compulsory retirement, its elimination in Manitoba appears to have had little effect on workers or working conditions in that province.

For further reference: Peter Warrian, *Mandatory Retirement: Experiences in Manitoba,* and Joyce Martin, *The Elimination of Mandatory Retirement in Manitoba,* reports commissioned by the Task Force.

Age Discrimination in Employment Under the Manitoba Human Rights Act

In Manitoba, legislation concerned with discrimination in employment was first enacted in 1953 under the Fair Employment Practices Act, and its provisions were superceded by the employment provisions of the 1970 Human Rights Act. However, it was not until 1974 that amendments introduced to the Human Rights Act specifically raised the issue of age discrimination in employment. Section 6(1) of the Act states:

> 6(1) Every person has the right of equality of opportunity based upon bona fide qualifications in respect of his occupation or employment or in respect of training for employment or in respect of an intended occupation, employment, advancement or promotion, and in respect of his membership or intended membership in a trade union, employers' organization or occupational association; and, without limiting the generality of the foregoing
>
> (a) no employer or person acting on behalf of an employer, shall refuse to employ, or to continue to employ or to train the person for employment or to advance or promote that person, or discriminate against that person in respect of employment or any term or condition of employment;
>
> (b) no employment agency shall refuse to refer a person for employment, or for training for employment, and
>
> (c) no trade union employers' organization or occupational association shall refuse membership to, expel, suspend or otherwise discriminate against that person; or negotiate, on behalf of that person, an agreement that would discriminate against him;
>
> because of race, nationality, religion, colour, sex, age, marital status, physical or mental handicap; ethnic or national origin, or political beliefs or family status of that person;

Section 6(9) states that:

> 6(9) Nothing in this section prevents a person from limiting the employment of a person under the age of majority or from classifying or referring to a person under the age of majority for employment in accordance with the provisions of any provincial law regulating the employment of persons under the age of majority.

The Manitoba legislation represented in one aspect an important distinction from Human Rights legislation in most other jurisdictions: the absence of an upper limit to age coverage

(elsewhere in Canada, only the New Brunswick Human Rights legislation had no age ceiling). Furthermore, Section 7(2) of the 1974 Act stated:

> 7(2) No provision of Section 6 or of this section relating to age prohibits the operation of any term of a bona fide retirement, superannuation, or pension plan, or the terms or conditions of any bona fide group or employee insurance plan or of any bona fide scheme based upon seniority.

In its reference to the "operation" of retirement or pension plans, this section contained language somewhat weaker than was the case in most provincial legislation. Although the Alberta Human Rights legislation referred also to the "operation" of such plans, most jurisdictions contained clauses explicitly allowing "termination of employment" in connection with retirement or pension plans.

A 1976 amendment to the Act replaced the explicit reference to retirement, superannuation or pension plans by the more general "employee benefit plans":

> 7(2) No provision of Section 6 or Subsection (1) shall prohibit a distinction on the basis of age, sex, family status, physical or mental handicap or marital status
>
> (a) of any employee benefit plan or in any contract which provides an employee benefit plan, if the Commission is satisfied on the basis of the guidelines set out in the regulations that the distinction is not discriminatory or that the employee benefit can be provided only if the distinction is permitted ...

It was the combination of these two factors, the absence of an upper limit to age and the weaker language relating to pension schemes, which permitted compulsory retirement practices to be challenged as discriminatory on the basis of age.

Legislative Intent

Yet the eventual abolition of compulsory retirement brought about by the 1974 amendments to the Human Rights Act had not been anticipated prior to their introduction. The decision to amend the Act appears to have arisen out of a concern for the employment opportunities of individuals aged 40–65 who might be experiencing labour market difficulties. The legislative debates of the time reveal the absence of the compulsory retirement issue, and submissions to the 1982 Manitoba Commission on Compulsory Retirement by two Provincial Cabinet Ministers at the time of the amendments confirm it. Sydney Green declared in his submission that "I know of no legislator at the time", and Ben Hanuschak confirmed that "at no time in the House was there any discussion with relation to the Human Rights Act as it may affect or apply to people seeking retirement".

Furthermore, Flanagan indicates that the 1976 amendment regarding benefit plans which further weakened the legitimacy of fixed retirement "had been conceived as a purely technical measure", the consequences of which were foreseen by neither the Manitoba Human Rights Commission nor the government.

The actions of the provincial government and of the Manitoba Human Rights Commission itself demonstrated a reluctance to interfere with current retirement practices, even following the 1977 decision by a board of adjudication in *Derksen v. Flyer Industries* which concluded that the complainant had been retired in violation of the age discrimination provisions of the Human Rights Act. Flanagan has concluded from annual reports of the Commission that its policy relating to retirement cases had been to conciliate only in instances where the absence of a pension was likely to result in financial hardship to the complainant. The decision in *Derksen* was, in effect, ignored by the Commission, which continued to follow its previous policy, due in part to pressure from the Provincial Cabinet. In fact, "the Minister of Labour privately threatened the Commission that he would "cap" the definition of age in the Act if the Commission started accepting complaints about retirement in general".

This reticence in confronting the issue of compulsory retirement was characteristic of both the NDP and the Conservative government which replaced it in 1977; the new premier also replaced the Human Rights Commission the following year. The treatment of two age discrimination complaints which arose in 1978, *Finlayson v. City of Winnipeg* and *Newport v. The Government of Manitoba*, is illuminating. The first complaint, already on record with the Commission, "was put on a bureaucratic merry–go–round", and was not sent to adjudication for almost three years. In the case of Newport, the Commission initially refused to receive the complaint, but eventually was forced to do so by the threat of Newport's counsel to obtain a writ of mandamus.

> Once it received the complaint, the Commission conducted a perfunctory investigation and then called upon the Attorney General to appoint a

Board of Adjudication. Whereas the Commission legally has "carriage of the complaint" and normally appears with the complainant and pays legal expenses, in this instance it removed itself from the proceedings, leaving Newport's counsel to act *pro bono publico*.

That the provincial government favoured the continuation of current labour market practices is clear; not only did the provincial civil service continue to retire its employees at age 65, but even after the introduction of age into the Human Rights Act and after the 1977 *Derksen* decision, legislation was passed which supported the practice of fixed retirement. Section 50 of the Public Schools Act as revised in 1980 allowed public school divisions to establish a compulsory age of retirement for teachers. However, judicial decisions continued to support clams of compulsory retirement as discriminatory. By the end of 1980, two compulsory retirement complaints brought against the University of Manitoba had succeeded. In the first, *McIntyre v. University of Manitoba*, the actions of the Human Rights Commission in the Finlayson and Newport cases prompted McIntyre's counsel to direct the complainant to the Manitoba Court of Queen's Bench as permitted under Section 34 of the Human Rights Act. The decision of Queen's Bench was upheld by the Manitoba Court of Appeal in January 1981; in the interim, the second case was resolved by a board of adjudication. These decisions, in addition to the presence of similar complaints before the Human Rights Commission, led the government to consider the possibility of amending the Human Rights Act by placing a "cap" on the age provisions relating to employment. In March 1981, a Commission on Compulsory Retirement was appointed to address the issue; the Commission's Terms of Reference directed it to consider "the advisability or inadvisability of revising the Human Rights Act and/or related legislation." Marshall E. Rothstein was appointed Commissioner.

The Commission on Compulsory Retirement

The Commission considered a number of issues related to compulsory retirement. Although these considerations included the political and economic overall, the human rights perspective prevailed.

Submissions to the Commission revealed no overwhelming support either for or against the practice of compulsory retirement. Of 43 submissions received, 21 opposed compulsory retirement, 18 favoured the practice, and four did not offer a recommendation. Submissions from individual employers and employer organizations generally supported compulsory retirement, while Human Rights organizations were strongly opposed. No clear position arose from the submissions of individuals. Labour organizations, too, were divided on the issue.

Two issues raised repeatedly in briefs and submissions were the role of collective bargaining in determining retirement policy and the adequacy of pension income. With regard to the former, support for the collective bargaining process was evident in the submission of both the Canadian Manufacturers' Association and the Manitoba Federation of Labour, which further expressed the opinion that abolishing compulsory retirement would constitute a regressive step in the struggle by workers for earlier retirement and adequate pensions.

Among those organizations opposing compulsory retirement the adequacy of pension benefits was a major concern, in several respects. The Manitoba Organization of Nurses' Associations stressed the relatively poorer position of working women who are "adversely affected by pension portability and vesting rules and late return to the work force after marriage and raising a family ... (factors which) restricted pension income after retirement" and expressed the belief that financial hardship could be averted in some cases by permitting individuals to work after the age of 65. In another vein, the submission by the Canadian Union of Public Employees, while opposing compulsory retirement, expressed the concern that if the practice were disallowed employers would not take responsibility for developing adequate pension plans.

Other concerns were raised regarding potential administrative problems if compulsory retirement were disallowed; these difficulties included budgeting and costing problems in addition to general planning and manpower forecasting.

Following an evaluation of the submissions, recent research studies on retirement policy and existing case law, the Commission reached a number of conclusions, among them:

- Canadian public opinion in recent years had become increasingly opposed to compulsory

retirement, though recent surveys identified those opposed to be a still small majority.

- The right to equality of opportunity should be extended to older workers; compulsory retirement is a violation of this right. The Commission was "not satisfied that compulsory retirement should be left to the collective bargaining process. Leaving the matter to the will of the majority with resulting denial of minority rights cannot be justified".
- Although it is difficult to ascertain the number of individuals who would continue to work past the normal retirement age if compulsory retirement were abolished, it would appear to be a relatively small proportion of the labour force.
- the abolition of compulsory retirement would be unlikely to have a significant adverse effect on employment opportunities for youth because of the estimated small increase in the older labour force, the expectation that the duration of extended work life would not be great, and the limited number of occupational groupings in which a position vacated by a retiree could be filled by a young worker.
- Older workers are generally not inefficient. Although some performance appraisals may be inadequate or poorly administered, this problem is not solved by, nor does it justify, compulsory retirement.
- The "reasonable occupational qualification and retirement" exception in Section 6(6) of the Human Rights Act has merit. Exception must be based on both the honest motive of the party relying on the clause and objective facts and reasons. Public interest may justify such an exception.

In summary, Rothstein recommended that:

> The practice of compulsory retirement be abolished in both the private and public sectors in Manitoba, consistent with recent judicial interpretation of the Human Rights Act.
>
> Those provincial statutes with provisions for compulsory retirement should be repealed.
>
> Age should continue to be an exception in instances of "reasonable occupational qualification and requirement" as in Section 6(6) of the Human Rights Act.
>
> The Human Rights Act should be amended to explicitly assert its precedence over other legislation.

Other recommendations included an ongoing monitoring and assessment of the impact of abolishing compulsory retirement on workers, employers, and required changes to pension and benefit plans.

Exception to Age Discrimination

The Human Rights Act states in Section 6(6), and case law in Manitoba and other jurisdictions confirms, that age may constitute an exception to anti–discrimination legislation when it can be shown to be a "reasonable" occupational qualification:

> 6(6) The provisions of this section relating to any discrimination limitation, specification or preference for a position or employment based on sex, age, marital status, family status, physical or mental handicap, or political belief, do not apply, where
>
> (a) sex, age, marital status, family status, or political belief, is a reasonable occupational qualification; or
>
> (b) physical or mental handicap is a reasonable disqualification.

For the most part, legislation in other jurisdictions refers to "bona fide" occupational qualifications; the Manitoba language "emphasizes that the age qualification must be persuasive to external observers, no matter how sincere the employer's belief in it might be".

Judicial decisions regarding the application of the exception have placed the burden of proof of its applicability on the party relying upon it. Decisions have been based on consideration of:

- the nature of the job;
- whether public safety is at issue;
- availability and reliability of procedures to evaluate job performance;
- evidence as a factor in job performance in the absence of such procedures of age;
- proper or improper motivation in establishing the policy.

The exception has been applied in Canada and the United States to such occupations as policemen, firemen and bus drivers, in which concern for public safety and the absence of satisfactory evaluation procedures to measure individual performance and stress have been paramount. In Manitoba, the concept of "reasonable occupational qualification" has been applied narrowly on a case–by–case basis. In the complaint of *Finlayson v. City of Winnipeg* (1982), age was applied as an exception and the retirement of a Staff Inspector with the City Policy Department upheld. However, the

adjudication in *Ogelski v. City of Winnipeg* (re Deputy Chief of Police),

> rejected the ... argument that retirement at age 60 is a reasonable occupational requirement for all police officers regardless of rank ... it is the duties of the particular position and the practical realities of the work involved which determine whether retirement at age 60 is a reasonable requirement.

Impact of the Elimination of Mandatory Retirement

Little evidence exists as to the incidence of compulsory retirement in Manitoba prior to the judicial decisions which abolished the practice. The Commission on Compulsory Retirement made an attempt to identify the proportion of individuals in the province who were affected by compulsory retirement arrangements based on research by the Manitoba Department of Labour and by the Manitoba Health Organization, and information derived from a study by the Conference Board in Canada.

The Department of Labour study was based on a sample of approximately one half of all collective agreements registered in Manitoba, and concluded that less than 3 percent of surveyed agreements contained provisions for compulsory retirement. This represented slightly more than 4,000 of the 82,000 employees covered by collective agreements in 1981. Most of the agreements mandating retirement also contained provisions for extension of employment after the normal retirement age. Although the Commission recognized that the sample may have underestimated somewhat the number of collective agreements with compulsory retirement provisions, it concluded that the study provided evidence that "there is not a correlation between the existence of collective agreements per se, and a policy of mandatory retirement".

Data provided to the Commission by the Manitoba Health Organization (MHO) indicated that of the 11 collective agreements covering its members (health care facilities in Manitoba), none contained provisions for compulsory retirement; this was true also of the two pension plans covering all members. Compulsory Retirement, where present, was imposed by the employer institutions. Based on a small sample of member facilities, over one half of the employees were found to be subject to compulsory retirement practices. Although over 30 percent of institutions had policies allowing for retirement at the workers' discretion, this represented only 12 percent of employees.

Finally, the Commission considered the conclusions of the 1980 Conference Board study on mandatory retirement in the context of Manitoba in order to estimate the number of retirees at age 65 who might be subject to compulsory retirement. The Conference Board study had determined the proportion of employees likely to be subject to compulsory retirement provisions (based on pension coverage) and applied this percentage to the number of individuals in the 55 to 64 age group who would likely retire at age 65. In Manitoba in 1980, there were approximately 54,000 employees aged 55 to 64; the Conference Board predicted that 4 percent of these workers would retire at age 65 each year, or 2,160 annually. The Conference Board study also indicated that the incidence of compulsory retirement is directly correlated with the incidence of pension coverage; by applying Manitoba pension data to the annual number of retirees at age 65, the Commission estimated that approximately 1,100 employees, (0.2 percent of the provincial labour force) might be subject to compulsory retirement in a given year. The total number of such employees who would prefer to work beyond the age of 65, then, would likely be small.

Retirement Provisions in Employer Sponsored Pension Plans

The studies reviewed by the Rothstein Commission indicated that while compulsory retirement was not related to the presence of collective bargaining agreements, a strong correlation existed between the presence of mandatory retirement and private pension plans. In the 1980 Conference study, 96 percent of surveyed firms (Canada–wide) with pension plans also had a mandatory retirement policy. On the other hand, only 10 percent of responding firms without pension plans had policies mandating retirement.

In 1982, pension plans under Manitoba jurisdiction numbered approximately 100,200 members. While nearly all employer sponsored plans (97.5 percent covering 96.5 percent of members) provided an automatic retirement age (defined as the age at which it is mandatory for the employee to commence drawing pension benefits), considerable flexibility in retirement decisions still remained with the members.

Approximately one quarter of all plans, covering 68 percent of members, allowed for early retirement at the option of the employee, while

another 24 percent of members could retire early with the consent of the employer. Only 2 percent of all members were in plans with no provisions for early retirement. In the majority of cases, provisions for early retirement were conditional on some combination of age and years of service (67.4 percent of members); an additional one quarter of members were covered by provisions conditional only on the employee reaching a minimum age.

In addition, 87 percent of plans covering 60.4 percent of members contained some form of provisions for deferment of pensions after the normal age of retirement, although employer consent was required in the majority of cases.

Effective January 1, 1984, the Manitoba Pension Benefits Act was amended, consistent with the age discrimination provisions of the provincial Human Rights Act. The amendment states that:

> 21(5.1) Every pension plan shall provide that normal retirement and eligibility for pension shall occur at an age specified in the pension plan but nothing in the pension plan shall compel retirement at that or at any other age and the provision of a normal retirement age in a pension plan is not discrimination because of age within the meaning of The Human Rights Act.

Impact of Abolition

Consider next the ratio of employed persons to population for various age groupings of older Manitoba workers over the last decade. Among those in the age group 45–64 the employment ratio has remained fairly constant, rising only slightly in the early 1980s and gradually declining again to near the 1977 level. However, the figures for men and women in this age group are divergent; the proportion of women employed has risen steadily over the decade. Men, on the other hand are now employed in somewhat smaller proportions than was the case 10 years earlier. This pattern in male employment apparently reflects the higher incidence of early retirement in recent years (the participation rate for men in this age group has also declined, from 86.2 percent in 1977 to 82 percent in 1982); for women, increasing labour force participation has more than offset any increase in early retirement (female participation rates were 45.8 percent and 52.8 percent in 1977 and 1986 respectively in this age group).

For workers over the age of 65, the trend is similar; the generally declining employment ratio of men is offset by rising employment among women. The elimination of compulsory retirement predominantly concerns individuals in the age group 65 to 69. This range is due to two factors; the predominance of age 65 as the normal age of retirement (98 percent of Manitoba members of pension plans under provincial jurisdiction in 1982) and Revenue Canada requirements that pension plan payments commence by age 71. Predictions prior to the elimination of compulsory retirement (and evidence since that time) indicate that no significant changes were likely; labour force data bear this out. The employment ratio for this age group has declined gradually since 1978; more importantly, it has continued to do so since 1981. While consistent data is unavailable for females in this age group due to the small numbers involved, available figures show virtually no change in the last three years; the employment ratios in 1983 and 1986 were 9.3 and 9.2 respectively.

Incidence of Postponed Retirement

Documentation on the incidence of postponed retirement is scarce; what little exists indicates that the number of workers over the age of 65, while increasing slowly since the elimination of compulsory retirement, is still small. These conclusions are based on information from the Manitoba Superannuation Fund and from a survey conducted for the Task Force by Peter Warrian.

The Manitoba Civil Service Superannuation Plan has documented the incidence of deferred retirement since the 1982 decision in *Newport* which declared the compulsory retirement provisions of the Civil Service Superannuation Act to be in violation of the Human Rights Code. The Plan is comprised of over 30 public sector employers and has more than 25,000 participants, of which approximately one–half are employees of the Province of Manitoba, and the remainder of crown corporations, boards and agencies.

The experience in Manitoba is that relatively few employees are requesting work or actually working past the age of 65. The most common figure that employer and union representatives alike cite is that 0.5 percent to 1.0 percent of their current work force is comprised of post–65 year old employees. This general rule of thumb is confirmed in systematic data obtained for the public sector from the Manitoba Superannuation Fund and the Manitoba Health Organizations.

In the period 1982–85, 1,422 employees retired. Of these, 414 turned age 65 and were eligible to retire. Therefore those who turned 65 represented about 30 percent of all retirees. The remaining two–thirds retired at ages less than 65.

Of the 414 employees aged 65, 192 elected to continue to work. This represented 46 percent of those who turned 65 and 13.5 percent of all employees who retired during this period. The yearly average for employees continuing to work past age 65 compared to total retirees has not fluctuated significantly.

The number of employees who elect to continue working past age 65 has grown slowly since 1982: from 19 to 46 per year, of which there are approximately three males for every female. The 1985 male/female ratio of total pensioners is 68 percent males to 32 percent females.

Employees who elected to work past age 65 retired with an average 14.2 years of service. This compares with 15 years service for employees retiring at age 65, and 22 years for employees who retired prior to 65. Employees who work past age 65 accumulated, on average, an additional .738 years or approximately 9 months of service. Thus they still retire with less service than employees who retire at 65, i.e., with about 89 percent of the average service of a 65 year old retiree and 65 percent of the average service of all retirees. The longest an employee has worked past age 65 is to the age of 71.

By contrast, 54 percent of employees covered by the Civil Service Superannuation Fund retired *prior* to age 65, while 81 percent of teachers covered by the Teacher's Retirement Allowances Fund retired *prior* to age 65. Similar trends are to be found in employment data for the members of the Manitoba Health Organizations.

The data are of interest in several regards. First, they confirm the trends indicated in many interviews, that the great bulk of employees want to leave early rather than later. Employees retiring earlier than age 65 greatly outnumber those working past age 65. Second, most employees in fact leave prior to age 65, and the number working past age 60 has actually been dropping in the last five years. Further, of the small group that works past 65, most work for relatively short periods of time. Indeed, there is a suggestion that there is a half life of about one year. That is, of those who stay past 65, about half will retire in the following year; half again will go in the year after that, etc. This statistical phenomenon is interpreted by several senior management representatives as evidence that people are actually using this time for retirement and vacation planning.

Data from another public sector employer, the City of Winnipeg, also confirms the view stated by others that there has been no trend towards later retirement in the period since the elimination of mandatory retirement in Manitoba. The experience of the city as well is that relatively few workers stay on. In spite of some high profile legal cases, 31 of a total of 11,000 employees are currently working past age 65. The oldest is 70, with the majority between 65 and 67. Most are at the supervisory level.

There are are some exceptions, the most publicized being the case of the University of Manitoba faculty. The elimination of mandatory retirement since the McIntyre case in 1981 has been a significant problem for them. Two years ago the university introduced a new early retirement incentive program. There were few problems in the first stage of implementation. The numbers were small. Of 1400 faculty, 15–20 per year might be eligible. Originally about 50 percent stayed and 50 percent went. Of those who stayed 2/3 went before age 68. Now the overall faculty is aging, 1/3 are going and 2/3 are staying, totalling about 40 per year. And, they appear to be staying longer. It has not required a new response yet. They feel they are managing it.

Problems arise because the age profile of the different faculties is different. Arts and Sciences drives all the averages, but the university has 21 faculties and need a strategy for each. Also, each specialty has different market positions for replacements. The turnover rate at the University of Manitoba is 4 percent. The national average is 7 percent. The low rate may be related to the elimination of mandatory retirement. Where some do leave, the salary stays with the faculty. This is the only source of new hires, because of budget restraints. They expect to have a problem in the mid–90s with a large number of faculty in the 50 year old bracket. It will require a new initiative, because they will not be retiring and they may have burnout and restlessness.

Academics tend to see their career as their life and have unusual difficulty separating from the university. They tend to split the economic from the career issues. The university has set up a

senior scholars program that lets people stay on with their status and facilities, and participate in the institution.

For non–academics, the pattern is different. The same early retirement package is available, but not much else has been done to assist them. Two–thirds go before 65. Of those remaining, most go before age 68. The major reasons for it are chronic health problems. Those who do continue are often women with disrupted earnings and work histories, with low incomes and wages, single incomes because widowed. In short, most are pension poor older women.

Other exceptions also exist. In heavy industry there tends to be almost no one staying on. However, there is some evidence of a few employees at some of the smaller mines in the Province staying on. And, in some of the smaller, family–owned garment industry shops, older employees have stayed on past 65. It is reported that in small, family run shops, it is not uncommon to find people working to age 75–80. However, the newer operators want younger employees. There was also some evidence reported that employees in rural health care institutions are somewhat more disposed to work past age 65.

The consistent answer given in interviews was that few employees in fact request to work past 65, and fewer actually do it. Most go before age 65.

Previously, most companies have had a practice of mandatory retirement. The basis of the practice was company policy. It did not reside in the collective agreement or in the pension plan which usually only referred to "normal retirement age". In unionized settings, management took the position that its mandatory retirement policy flowed from its Management's Rights provision.

In all of the above statistics relating to the public sector, it should be kept in mind that there have been large scale improvements in early retirement provisions in recent years. For most of them, the actuarial reduction for an employee retiring before the age of 65 is only about *0.75 percent per year*, with no reduction at age 60. Many private pension plans, by contrast have actuarial reductions of *0.5 percent per month* prior to age 60, unless some special early retirement provision has been negotiated.

Retirement Decisions by Older Workers

The unanimous opinion was that the overwhelming majority of older workers want out early, rather than later. This was not only the response in traditional industrial sectors such as steel, mining and manufacturing, but also for civil servants at the Provincial and Municipal levels, nurses, hospital workers and service sector workers. Both the nurses and the steel workers are large organizations in the province. The steel workers reported only one of its 11,000 members, and the nurses 4 out of 9,500 of their members, working on past age 65.

There is equal unanimity that the decision of people to retire is made principally on the basis of availability of a decent post–retirement income and pension. Of those mentioned above who work beyond age 65, many do so for economic reasons, that is they do not have a pension or only a very poor one, they have suffered from interrupted earnings or a lack of portability of pension entitlement from multiple employers in the past. Many respondents brought up the particular difficulties encountered by "pension poor" older women. In this respect, the nurses represented by MONA may be a useful illustration. It is reported that the only concern the nurses have about working past age 65 is whether they will be forced to do it because of economic circumstances. Adequacy of pensions and post–retirement incomes are a particular problem for ex–nurses who have spent time out of the work force in child rearing, and/or working part–time. Now, older nurses are experiencing increasing difficulties maintaining the pace in caring for the acutely ill than before. Because of early discharge policies in hospitals, those now left in hospitals are more ill, nurse–patient ratios have increased, the acutely ill require more attention, more lifting, etc. At the same time, the MONA pension plan never did have mandatory retirement and there was allowance for pro–rated benefits for part–timers. As a result, nurses' decisions to opt for earlier retirement and not to want to work past age 65, is more purely "voluntary" than other groups who may have had contractual or peer restraints beforehand. One is then left with the explanation that changes in the work environment and the adequacy of post–retirement income are the dominant factors in the decision to retire, not its voluntariness as such.

Similar economic circumstances to those of the nurses, were reported for older male caretakers at municipal and school board employers. Typically, they might have come to that employment after being displaced from industrial jobs in the 45–50 year old range. And, having been at their new employees a relatively short period of time, they have low levels of service and entitlement under their pension plans.

Conflicting Interests of Older and Younger Workers?

There was very little reported in the way of perceived or expressed conflicts of interest between older and younger workers, both by employer and union representatives. This is even the case in small mining communities in northern Manitoba where some older workers have stayed on working in the mine at the same time that there are high levels of youth unemployment in the mining towns.

On the other hand, where such conflicts have been expressed, they have not been expressed as between older and young workers. They have been between the 65 year old and the 55 year old. The latter result somewhat contradicts the assumed employment trade off between older and younger workers on the part of some commentators.

Impact on Pensions Plans and Collective Agreements

There has been very little reported impact on employee benefit plans as a result of the elimination of mandatory retirement.

In Manitoba, like almost everywhere else, the language of most pension plans does not explicitly state a mandatory retirement rule in the pension plan itself. The customary language of the plans is to refer to "normal retirement age". Even with the elimination of mandatory retirement, a form of such contract langauge remains. For example, the Manitoba Civil Service Superannuation Act now reads,

> For the purposes of this Act, the normal retirement age of employees is 70 years and 11 months.

The reason for the continued reference is the Revenue Canada rule that pensions must commence no later than age 71. At the same time, there are limitations on contributions and accrual of benefits after age 65.

> Notwithstanding Section 3 and Subsection 21(5.3) of The Pension Benefits Act, where a person continues as an employee under this Act after reaching the normal retirement age,
>
> (a) he shall not make any further contributions to the fund under this Act with respect to salary earned after reaching the normal retirement age; and
>
> (b) the period after he has reached the normal retirement age and during which he continues as an employee under this Act shall not be included as part of his service as an employee under this Act for the purposes of calculating a superannuation allowance or an annuity under this Act.

Long Term Disability (LTD) plans, which customarily terminate benefits when the employee reaches age 65, do not appear to have been amended. There is an apparent acceptance that in the nature of the plans, the benefits are only to carry on until normal retirement age. Some plans were reported to be amended to refer to termination of benefits at the earliest age at which the employee would be entitled to an unreduced pension. In another case, following a formula developed in the United States, LTD benefits are gradually reduced after age 65 and this has not been seen as a form of age discrimination.

In the case of Group Life Insurance, those employers who provided Life coverage as long as a person was an employee, continue to do so if they are employed past age 65. One employer, again following a practice originated in the U.S., offers to buy the employees out of Life coverage after age 65. In other cases, the coverage is phased down after age 65. In general, however, no modifications to Group Life plans were required.

If minor administrative costs have been incurred, they have been absorbed into the general administrative cost of the plan. They have not produced any costing–related issues at the bargaining table.

The issue of Supplemental Unemployment Insurance benefits has not arisen as an issue. Because SUB benefits are only provided in cases of layoff, it is not expected to arise as an issue for such senior workers. It is speculated that if older workers ever did face layoffs, they would opt for their pension as a more desireable alternative.

Funding and Design Consequences for Pension Plans

No problems were reported with respect to the timing and level of pension fund contributions, flowing from the elimination of mandatory retirement.

Pension plan language had to be amended in a few cases, but it was not a costly, complicated or contentious issue between the parties. In most cases, the language of the existing plans only referred to "normal retirement age" and therefore it did not need amendment. However, some referred to "normal retirement age is 65" and these required change. No specific changes were reported to pension plans in regard to early retirement provisions that were related to the elimination of mandatory retirement.

One practical example of the kinds of amendments to current plans is that of the nurses' organization. It used to be that when the employees got to age 65, they ceased to contribute, but also got no actuarial increase if they worked on. Now, they get a choice: they can stop contributing or they can get an actuarial improvement.

On the other hand, a great deal of activity has taken place in recent years in the improvement or increased incentive for early retirement both in the public and private sectors. This has taken the form of special bonuses, reduction or elimination of actuarial reductions for early retirement, and major improvements in benefit levels. However, no one from any party related this to the elimination of mandatory retirement. It was universally related to economic restructuring, be it downsizing and closures in traditional industries, social program reductions by government, changed working conditions in health care delivery or simply budget restraint.

Implications for Human Resources and Industrial Relations Practices

The major change in management behaviour toward older workers has been a significant increase in pre–retirement counselling and pre–retirement leave practices.

Much concern has been raised about the introduction of new disciplinary or job performance appraisal systems if the traditional bench mark of age 65 is removed. However, in practice, not a single case was reported. Numerous management representatives discussed recent efforts to improve or tighten up their performance appraisal systems. However, most acknowledged that there had been poor consistency of implementation of appraisals in the past and none of the current efforts was targeted at the elderly nor introduced because of the elimination of mandatory retirement. This view was confirmed by union representatives. Further, both groups reported that where appraisal systems had been tightened up and controversies or grievances had arisen, they were not over the 60–65 year old, but more likely over 20–30 year old.

There were no reported instances where age/service played a role in job classification. However, it was reported that several hospitals had a practice in the past of retiring employees at age 65, and if they wanted to work past 65, they had to agree to a new hire status as a "casual" with losses of rights, wages and benefits. This has now stopped.

As a whole, there has been no need to amend collective agreements because of the elimination of mandatory retirement. However, one exception is the case of a few collective agreements, such as that between the United Steel Workers and Abex Industries Ltd. which provided that at age 65 employees lost their seniority.

7.8 Seniority shall be terminated and employment cease for any of the following reasons:

a) if an employee voluntarily leaves the employ of the Company.

b) If an employee is discharged for just cause.

c) If an employee with seniority of one (1) year or less is laid off for more than twelve (12) consecutive months or if an employee with seniority of more than one (1) year is laid off for twenty–four (24) consecutive months.

d) If an employee fails to return to work upon the expiration of an authorized leave of absence or an extension of a leave of absence unless he gives reason satisfactory to the Company for such failure to return to work.

e) If an employee has attained age 65.

The collective agreement was subsequently amended to delete sub–Section 7:8(e). However, while there was indication that there are some other contracts with similar provisions, they are relatively few. In these contracts as amended, and in the vast majority of pre–existing contracts, employees working beyond the age of 65 retain seniority rights for promotions, demotions, transfers, layoffs, etc. Older workers, while retaining their seniority rights, are reported

as being concerned that in cases of downsizing, etc., they may be at greater risk where management has discretion over which jobs may be eliminated.

In an ironic twist, several union representatives reported as confirmation of the desire of the membership to go early, in several recent downsizing cases, such as the airline operations in Winnipeg, that there have been reverse seniority provisions negotiated, where in cases of pending layoff, the most senior person is given the option to go first.

No new forms of disciplinary or physical health monitoring have been introduced. There have been some controversies about specific occupational groups, such as the regular Winnipeg police, where physical condition was found to be a reasonable criterion for forced retirement at age 60, in the interest of public safety. However, in the recent publicized case of the Assistant Police Chief, it was not found to be appropriate.

No forms of mid–term negotiations have been required between the parties. Changes to pension and benefit plans have been taken care of as administrative matters. No grievances were reported by either side. And, no jurisprudence in labour relations, such as arbitral case law was reported. What legal activity that has taken place has arisen from complaints lodged under the Human Rights Code and court cases.

No respondents reported the number of people opting to stay on, or the prospect of such, to have warranted the conducting of separate or special costing studies in respect to pension or employee benefit plans.

The one area identified as a direct change in response to the elimination of mandatory retirement has been a recent trend to introduce contracts of employment for senior managers. It is a fact that of those who do stay past age 65, many are senior, high income professional groups. Senior managers in these categories may well be faced with employer requirements that they agree to fixed term and fixed conditioned, individual employment contracts in the future. This was described by respondents as directly linked to the outcome of the series of court cases in Manitoba.

As mentioned previously, there is a somewhat unique situation at the university where a major new early retirement program had to be introduced. It was the first of its kind in any Canadian university and is now regarded as a model for others. It is not in the collective agreement and neither side apparently wanted it in. The university wanted it outside for flexibility reasons and academic staff wanted it outside because they didn't want the union directly involved because they regarded the question as highly individual and personal. The Faculty Association has left it alone.

The policy is published and is applied without modification, allowing that there is flexibility built into it. The union has only wanted assurance that there is no favoritism and no special deals are struck outside it.

All university staff, academic and non–academic are entitled to the early retirement policy after 10 years of service. It is regarded by the employer as "eligibility" and not as an entitlement.

No tenure review or performance appraisal system has been introduced for elderly staff.

Regulatory Changes

The elimination of mandatory retirement has been a politically, legally and administratively dictated change. There was no evidence that the elimination of mandatory retirement came about as a result of a large demand on the part of employees or between the parties themselves.

While there have been few problems reported, the fact is that a number of representatives, on both the management and union sides, were of the view that this was an "imposed change" that they did not seek or desire. Some union representatives stated that they felt somewhat disadvantaged by the change in that it took away from them something that they previously had. Business representatives, on the other hand, took the view that this was but the thin edge of another wedge of government intrusion into their affairs. As well, there was concern expressed that the form of the intervention, without exemption, was a disruption of freedom of contract and existing private contracts. Neither side thought that it was an immediate or fundamental invasion of their rights, but expressed concern about it as a trend for the future. The attitude of the union membership at large was reported as being in favour of keeping and enforcing mandatory retirement at least in basic industries. They feel that elimination of mandatory retirement is an imposition by the Charter and what they really want is to be able

to go at age 60. The strength of their feelings is confirmed by the fact that the matter has been an active issue at membership meetings. The steel worker view is that they want out before age 65 with dignity and decent benefits.

There was some expression of opinion concerning possible exemptions for the elimination of mandatory retirement. These were all related to occupations involving public safety or the safety of others, such as fire fighters and police, but also possibly heavy equipment operators of some kinds.

Advice from the Parties

The general advice from respondents in Manitoba was that it has not been a big problem. Many respondents had expected problems but it has not turned out that way. Those problems that do exist, even in the university setting where the numbers have been the largest, are viewed as being manageable.

The only caveat respondents made was that if in future, large numbers of people did opt to stay on, a number of the labour relations, disciplinary, conflict of interest, cost, performance appraisal and litigational issues could indeed come about. Until then it is still too soon to know. Management as well as labour representatives stated that there may be a longitudinal problem that is not yet in sight.

Several respondents were of the view that one major reason why there has been so little controversy about the elimination of mandatory retirement is that the macro–economic environment has changed. That is, when inflation was so high in the 1970s, many people were very afraid to take retirement because of the prospect that their post–retirement income would be completely eroded after several years. Now that the fear of inflation has abated, people are less apprehensive about taking retirement, at age 65 or often taking early retirement before age 65. Stated differently, employees have less macro–economic pressure on them to motivate them to stay on at work. The prospect of being "forced" to retire, therefore abates as well.

Union respondents also gave the forceful view that while everyone concedes the central importance of adequate post–retirement income in the whole debate over elimination of mandatory retirement, the governments have taken this one issue in isolation from the pension policy field. The whole array of pension reform issues that have time and again been raised by legislative committees, royal commissions, etc., are being totally ignored by the narrow focus on voluntariness of mandatory retirement provisions. Issues such as portability, indexing, "pension–poor" older women, etc, are being ignored. Indeed, one reason given for the smoothness of the adjustment to elimination of mandatory retirement in Manitoba was that it was brought in more or less co–incident with major pension reform legislation.

Finally, several union respondents raised concern about the future impact of recent changes in the Canada Pension Plan, allowing employees to take early retirement with CPP benefits at age 61. A number of organizations reported a significant increase in the number of their members interested in early retirement since the new CPP changes came into effect in January 1987. In effect, this provision allows people to get more in the way of CPP benefits early, but less later. It could be that people will experience shortages due to lower levels of public pension entitlement later in life and this could effect dispositions to re–enter the work force at a later date.

Employers, while conceding that there have been no major problems to date, express concerns in two practical areas. First, they fear that if significant numbers of employees stay on in the future and there are productivity problems, then they will be faced with costly court cases to prove that they did not discriminate. Secondly, for small employers in particular, they fear that the whole trend is more government intervention that will require them to add to their administrative overhead and possibly their personnel staffing to cope with it all.

It should be noted that the original Rothstein Report on mandatory retirement in Manitoba recommended that after five years, a follow–up study should be done to analyze the actual experience and impacts of elimination of mandatory retirement on employees, employers and unions. So far, this has not been done.

10

New Brunswick

Introduction

The elimination of mandatory retirement has had little practical impact in New Brunswick, which in 1973 became the first Canadian jurisdiction to tackle this issue. Few employees — less than 1 percent — have expressed the wish to stay on. Most want to go early. Furthermore, it is agreed in all quarters — government, employers and unions — that the decision to stay on is based on the adequacy and availability of post–retirement income.

However, the situation in New Brunswick is quite different than Manitoba in that the legislative provision the elimination of mandatory retirement is different, as is the understanding of the parties. The focus of this is the "exemption" or "loophole" in the application of the Human Rights Code. That is, the Code eliminated mandatory retirement *except* where the employees were covered by an existing pension or retirement plan that provided for mandatory retirement. There is universal agreement in the Province that this exemption/loophole is the key to the New Brunswick situation, but widespread disagreement about its desirability and appropriateness.

Who Stays on After 65?

As mentioned above, the impact of the elimination of mandatory retirement in New Brunswick is similar to that in Manitoba: a relative non–event. Of those who stay, the majority are employees with short service or inadequate pension entitlement. The latter has held true across sectors and occupations, from hourly wage and salary workers to university professors.

The Province, as an employer, has taken a clear position in favour of the elimination of mandatory retirement. In a formal policy statement, it was declared:

For further reference: Peter Warrian, *Mandatory Retirement: Experiences in New Brunswick,* a report commissioned by the Task Force.

1. The government abolishes age as the basis for mandatory retirement.
2. Age 65 shall continue to be the normal retirement age of public servants, however, employees who wish to remain at work past age 65 shall be permitted to do so provided they are in good health and their work performance is satisfactory.
3. Authority for granting extensions, and for ruling on performance, shall rest with the Deputy Head of each department, and agency in Part I, each School Board and each Hospital Board. A School Board or a Hospital Board may delegate this authority to the School Superintendent or the Hospital Administrator respectively.
4. Approval to work beyond age 65 shall be granted for no more than one year at a time, however, approval may be renewed for further periods of up to one year subject to a written evaluation of the employee's performance which indicates that it continues to be satisfactory.
5. Jobs which for health related reasons have a mandatory age of retirement attached to them by legislation or regulation are exempted from this policy.
6. A retirement counselling program that educates employees about the social, economic and psychological and physiological aspects of retirement shall be developed and offered under the auspices of Personnel Management Division to all public employees. The program shall be developed to occur at intervals for a period of years prior to retirement.
7. This policy shall be communicated to all employees.

Similarly, the New Brunswick Public Employees Association has endorsed the principle:

1. Mandatory retirement from Public Service at a fixed age makes no provision for the retention of hale, healthy and productive individuals whose services are an important contribution to management and to society in general.
2. An unlimited working age implies an ever increasing median age group in the labour force with a corresponding hardship imposed on the youth of the Province, who are already hard pressed to find meaningful employment.
3. A middle–of–the–road course is available. It is the opinion of the NBPEA that retirement age should be the right of the individual and not an arbitrarily fixed age bearing no relation to ability and efficiency. We are of the opinion that, since later pensions are limited by law to 70 percent of median salary, early pensions should not be penalized by actuarial reductions as at present.
4. To sum up, an employee should have the right to retire at any age, providing a minimum of five years service has been attained, and to draw a fully accrued pension without penalty. We realize that indexing (limited or unlimited) cannot be applied completely to these pensions and that some indexing factor must be considered. We suggest that indexing should not begin until the age of sixty (60) is reached; or until a service +

age factor of 85 (as in Federal Plans) or 90 (as in Provincial Plans) is reached, which ever comes first.

5. We realize that the foregoing is perhaps an over-simplification but we would enjoy participating in any actuarial studies along these lines.

In practice, the NBPEA reports that they have very little experience with people working past 65.As indicated above, their position is that you should be able to go when you want to go. No complaints or grievances have arisen over the employer's policy and it has not resulted in any court or Human Rights cases. As pointed out above, very few employees stay on, and those who do tend to be employees with interrupted earnings or career paths who have insufficient resources in their pension plans.

As elsewhere, the university system has witnessed some of the most publicized cases involving the elimination of mandatory retirement. There is no doubt that, as a result of Human Rights complaints several years ago, the personnel practices at the University of New Brunswick were amended. The practical outcome is somewhat similar to that at the University of Manitoba. However, the university administration and the Faculty Association have very different, if not conflicting, interpretations of the current status of the elimination of mandatory retirement. The new post-65 arrangements have been worked out explicitly within the framework of the faculty collective agreement, with the Faculty union acting as a direct party. Finally, the new deals for post age 65 employment include set terms as well as revised benefits. In all these latter respects, the university's post age 65 arrangements are quite different than in Manitoba.

Furthermore, it is not entirely clear to the Faculty Association whether the Human Rights Code has meant the elimination of mandatory retirement. The loophole is the issue. The Faculty Association holds that mandatory retirement should be abolished and replaced by flexible retirement.

However, the Human Rights cases that have arisen involved faculty members with short work histories at the university, and therefore the prospect of poor pensions. Also, there has occasionally been an exceptional scholar that the university wanted to retain for its own reasons. Since 1980, approximately five faculty members per year come up for age 65 retirement, out of a bargaining unit of 580. Of these, two would have retired before age 65, two at age 65, and one would want to stay on.

A modus vivendi has been worked out between the university administration, faculty and professional librarians. If an employee wants to stay on, he or she can do so for one to two years with full pay and benefits. The administration, in consultation with the Dean and Academic Vice-President, prepares a draft agreement. A copy is put before the employee requesting to stay on, and the Faculty Association. When the draft is acceptable, it is signed by all three parties: university, the Faculty Association and the employee, who agrees to go after the defined time period has elapsed. These arrangements are made under the aegis of the collective agreement with the University of New Brunswick.

Article 46.02 of the collective agreement grandfathered previous rights and benefits, which reached back into the 1960s when there was no mandatory retirement. Mandatory retirement became an issue in the late 1960s and early 1970s, when it was used as a convenient personnel tool by the administration to get rid of older deans and department heads.

The university is trying to institute a flexible retirement policy, including reduced teaching loads and partial pensions with partial salaries. Many faculty members in their early 60s are interested in phasing out teaching and phasing in flexible arrangements.

Letter of Understanding (p.205) provides for Factor 90 procedures. They are jointly trying to arrange to target people between 60-65 to be able to go without an actuarial reduction. The Faculty Association wishes to reduce it to a Factor 85 like the teachers have. In their view the practical result has been a situation that works like Manitoba, but it is done through the collective agreement and the legislative context is not the same.

For the Faculty Association, the impact of greater flexibility has been beneficial for the institution, not the disaster that was feared. By contrast, the university administration gave a significantly different view of the status and outcome of the new retirement arrangements.

The university has prepared a formal policy statement on the issue:

> The University of New Brunswick recognizes that through retirement it is provided with an

> opportunity to recruit new employees who will contribute new expertise and skills to the university. For universities especially such a process of renewal is essential to the service they provide as centres for the transmission of knowledge and culture, scholarly research, and training for employment. For this reason the University of New Brunswick has established 65 years of age as the normal retirement age for all of its employees.
>
> The scheduled retirement date for all employees will be June 30th following their 65th birthday. This does not preclude an employee taking an early retirement or arranging a workload reduction leading to retirement.
>
> This policy applies to all employees of the University of New Brunswick.
>
> Prior to the employee reaching the June 30th retirement date, the Benefits Officer, Department of Personnel Services, will write the employee to arrange a meeting to discuss the status of pension and benefits.
>
> In exceptional circumstances (for example, to satisfy staffing requirements and/or to maintain special expertise) an employee may be offered a post–retirement appointment of a specified duration. This decision will be made by the President or the appropriate Vice–President.
>
> The Benefits Officer, Personnel Services, is available to assist employees who are contemplating retirement or early retirement.

In the exceptional case of post–retirement appointments, the administration view is that the employee retires and goes on pension. As a retiree, he or she is entitled to Accident, Death and Disability; Group Life; and Medical benefits. He or she loses sick leave and Long Term Disability coverage. Then he or she is given a post–retirement appointment with a pro–rated salary to make up the spread between pension level and the former salary level.

The university makes these decisions in light of their program needs. However, the issue has not arisen in the few cases — five — in recent years. If there is a surplus in a particular academic area, the university will not appoint.

The administration view, therefore, is that mandatory retirement still exists in New Brunswick. Their exempt status arises not from the fact that they have a pension plan containing a mandatory retirement provision, because they are under the Superannuation Plan, and it does not have any specific mandatory retirement provision in it. However, the legislation refers to "a bona fide pension or *retirement* plan". It is the latter that qualifies the university for exemption because their faculty collective agreement contains a "retirement plan".

In the specifics of the Kuun case, as well as two others that arose around the time, there were certain similar characteristics of all three individuals: they all had limited service and pension entitlements, because they were European immigrants, and all felt that the Administration had treated them unfairly.

The number of individuals requesting to stay on is small, less than 1 percent of the faculty total. However, the cost issues for the university are much larger than the numbers of individuals would indicate. Salary and support costs for each individual are high: for example, if the three individuals referred to above were to retire, the university could easily save over $250,000 per year in total costs. Furthermore, the availability of three teaching positions could determine whether the institution can offer course programs in specific areas. Therefore, the impact on the institution is much greater than the small number of individuals itself would indicate.

The non–academic staff can also apply for post–retirement appointment. However, virtually none do. In this respect their behaviour is similar to those in private industry. If they do apply, the administration will make a six month appointment, open to renewal. However, the experience is that people stay for one, or at most two, six month post–retirement appointments.

The administration does not see any problems with other collective agreement rights and benefits.

The administration is opposed to the complete elimination of mandatory retirement. They see definite problems in performance appraisal, both for the academic and support groups. On the academic side, what might constitute an appropriate appraisal system is unclear; applying existing tenure procedures would not necessarily be suitable. On the support side, there are problems with conventional productivity measures and procedures.

Furthermore, the administration definitely expects that the elimination of mandatory retirement will have significant cost impacts on employee benefit plans, but the current numbers are so small that the effects have not appeared yet. For instance, the cost of supplemental health coverage is increasing significantly.

In summary, university faculty, like most other working people, tend to leave if they are at or near age 65 and have a reasonable pension. Faculty tend to be more attached to their institutions because they see it as their way of life in a way that is different from other people's work attachments. Administration feels that its system of post–retirement appointments meets the needs of the institution and the wishes of the individual. Their early retirement program may amount to an academic "buy–out", but it is working and is being done under the umbrella of the faculty collective agreement.

Impact on Collective Agreements and Benefits

In considering the impact of elimination of mandatory retirement on collective bargaining and agreements, surveyed parties reported that it has been a relative non–event in New Brunswick. No problems have arisen at the bargaining table nor have any been reported in the administration of agreements.

The greatest priority of local bargaining committees continues to be to get improved and reduced early retirement. In fact, the pressure to go early is increasing from all economic sectors, public and private, blue and white collar. Indeed, union representatives report that more office and technical workers are now expressing the interest to retire early and to shape the pension plan accordingly.

The non–impact on collective agreements in New Brunswick is axiomatic. The nature of the exemption in the Code is that where there are pension plans, the Code doesn't apply. While pension plans are not restricted to the unionized sector, they are pretty well universally present within unionized settings. Therefore, the Code in effect virtually exempts the whole unionized sector from its application. There are collective agreements whose pension plans do not provide for mandatory retirement, such as in the New Brunswick government and the New Brunswick Public Employees Association agreement, but the parties have themselves crafted the agreement to accommodate voluntary retirement from the start.

Other parties report no problems. In fact, the most publicized cases, from the Shipyard in Saint John and the City of Moncton, arose in somewhat anomalous situations.

In the Moncton City case, the employee was in the bargaining unit, but had been too old when he joined the employer to be admitted to the pension plan. The City retired him, he applied to work on, and was refused. He went to court over the issue and won, eventually accepting a cash settlement.

The other case was that of a Saint John's drydock worker. Like the city worker, he had not been admitted to the pension plan and he wanted to work on. Because he was a crane operator and anticipated the medical monitoring issue, he had gone to a specialist and been cleared as fit. After winning the case, he reportedly went back to work for a few weeks to prove a point, then retired.

There are other collective agreements and pension plans reported which allow the employee to apply to work on. However, the provision is within the plan itself and has not been the result of the Human Rights Code and cases. Such provisions have been around a long time. In all cases reported, employees who have applied have been given permission to stay on, generally for a year at a time. There have been cases where the employer has given one extension but refused to give another. This has never been challenged.

When people stay, they do so for a short period of time. Often, it appears to be an adjustment period. One factor is the retiree's tax position. Most who stay are receiving a salary plus OAS and CPP, which move them into a higher tax bracket so that they perceive that it is not worthwhile to work on.

There have been no cases reported of the introduction of special monitoring.

Perspectives of the Major Parties

Government, employers and unions see the present situaton in fundamentally different ways. Employers and unions believe that the New Brunswick Code, with its exemption, is a good compromise. The Human Rights Commission views it as an unfortunate and anachronistic flaw in law and public policy.

Employer representatives were quite forthright in stating their opposition to an unqualified elimination of mandatory retirement. They stated that they have experienced no problems under the present system. For them, the case of the

Saint John's shipyards' employee referred to above clarified the situation for everyone.

On the other hand, employers believe that there would be problems if a complete elimination of mandatory retirement was decreed. Employers view this possibility as a threat to management's ability to manage, and to their ability and right to assure productivity. They expect productivity problems related to aging and efficiency. As well, they would expect costing problems related to maintaining existing pension plans.

In a general sense, employers don't believe that there is much demand by workers to stay on. Employers are skeptical too about the justification for the elimination of mandatory retirement, which they view as not coming from the workers.

Philosophically, employer representatives see it as an issue of control over the work force. They also have a problem with the notion that a third party will re–open their contracts. This is part of their concern about changes to the Labour Relations Act about re–opening collective agreements for reasons of technological change. In summary, they see the current New Brunswick situation as a mix and compromise that has created no problems for them and they are strongly opposed to further change.

The view of the labour movement is somewhat similar to that of employers, although it leads them to different conclusions.

For the unions, mandatory retirement has not been eliminated in New Brunswick. The exemption for pension plans means that the labour movement views mandatory retirement as still being in place and that that is a good thing.

The labour movement is in favour of voluntary retirement except where unions have negotiated something else. The issue for them is preservation of collective bargaining. Legislation is seen as third party intervention and it is not welcome. The issue is one of economic necessity which, in the labour movement's view, is being ignored by civil libertarians.

The labour movement makes the point that there is not a Pension Benefits Act in the province, only a requirement that plans be registered. There are no criteria for administration or for minimum standards for benefits, etc.

In labour's view, the government has focused on this one minor issue while ignoring pension reform. The real need, from this perspective, is for better private and public benefits, which are being cut back. Even the province's pre–retirement training program is being cut back.

In summary, the New Brunswick labour movement sees economics as the real issue behind retirement decisions, not the civil rights issue of voluntariness. Those with legitimate economic reasons to stay on will find the rules stacked against them. Discipline, health monitoring, and performance appraisals will take place if mandatory retirement is abolished. These devices will not touch the higher levels of civil servants sitting behind desks with fat pay cheques who advocate abolition. The labour movement wants the Human Rights Code to remain the way it is.

A fundamentally different view was expressed by representatives of the Human Rights Commission. In their view, there have been no insurmountable problems arising from the elimination of mandatory retirement. In 1973, when it first came in, about 32 percent of employees in the province were covered by pension plans. Now over 50 percent are covered. The Human Rights Commission believes that far less than 50 percent are covered by mandatory retirement because not all plans provide for it. The Commission also believes that the publicized cases have contributed to increased pension coverage in the province. Therefore, Human Rights Commission interventions have contributed to the betterment of all.

The Human Rights Commission staff agree with the view of employers and unions that people who work past the age of 65 do so because of financial need.

The shipyards and city of Moncton cases laid the groundwork. The loop hole was created in 1984. There has been concern about high risk occupational groups like crane operators and school bus drivers where age and ability could be a public safety risk. For that reason, age exemptions have been applied to some occupational groups. If the employer believes that an employee/occupation is in such a category, they apply to the Human Rights Commission for an exemption. The Human Rights Commission will then make a declaration about the exemption.

There have in fact been only a handful (five to six) of cases for declarations.

The Human Rights Commission, in its view of the Kuun case, does not see the University of New Brunswick deals as beyond the Human Rights Code, although this has not been put before them as a complaint.

Long Term Disability has been allowed as an exemption, because of the nature of the benefit itself. The Human Rights Commission has published explicit guidelines covering employee benefit plans.

The complaints that have been received have come from the quasi–public sector mostly: small nursing homes, small municipalities, etc.

In the view of the Human Rights Commission, the only real argument employers are making is that of control of the work force. The latter say that the Human Rights Commission will force them to throw employees out on the street. In reality it is an attempt to try to hold on to antiquated Human Resource policies. Human Rights activists want to eliminate the loophole. They see the Human Rights Commission staff in a mediation role, which claims to sort out 98 percent of the problems without having to resort to formal hearings, particularly with small employers.

The Human Rights Commission sees collective agreements as a domestic contract beyond the reach of the Charter. The Charter does not relieve politicians of their responsibilities to legislate positively in favour of social and economic rights. The Commission staff feel that they have to go back to the legislators to close the exemption with legislation.

The exemption applies to pension plans. The fact of having a pension plan does not relieve the employee benefits and other collective agreement provisions from the Human Rights Code. They are not swept in by the first exemption. However, this has not been the subject of complaint or study.

11

Quebec

Introduction

Before the adoption of Bill 15, there was no formal policy concerning the obligatory age of retirement in federal or provincial legislation. In general, the obligatory retirement age was set at 65 years as a result of institutional practices, specifically, the payment of benefits from the Old Age Security Plan and eligibility for the Quebec Pension Plan beginning at the age of 65. Thus the majority of supplemental pension plans also fixed the age of retirement at 65.

The Premier had initially intended merely to raise the mandatory retirement age from 65 to 70. However, when Bill 15 was introduced into the National Assembly in April 1981, it proposed to entirely abolish compulsory retirement on the basis of age or number of years of service. Other provisions of Bill 15 were:

- That these rights apply to all employees, whether or not they are members of a pension plan (public or private), including government employees.
- That employees had the right of appeal before a labour commissioner if they believed these new rights had not been respected.
- That the employee's right to voluntarily retire was preserved.
- That an employee who continued working beyond the age or number of years at which he would be eligible for maximum pension benefits must continue to contribute to the pension plans even though benefits could increase no further.
- That the abolition of mandatory retirement would not apply to persons already retired on the date the Bill was sanctioned, or to other specified groups.

When the regulations of the Bill were enacted these "other groups" included only fire fighters and members of the Surete de Quebec. Bill 15 also amended the Act on Labour Standards (1979) to comply with the provisions to abolish mandatory retirement. These changes related to the employee's right to remain at work (Article 123.1); the employer's right to dismiss, suspend or replace an employee for just and sufficient cause (Article 84.1); and the employee's right to submit a complaint within a period of 90 days to the General Commissioner for Labour, and/or request an inquiry by the Labour Standards Commission.

Bill 20 made complementary changes to the regulations governing supplemental pension plans, including the provision that the employee could not receive the pension while remaining at work beyond the plan's normal retirement age. The changes to the Act on Labour Standards took effect, depending on circumstances, on April 1, 1982 or January 1, 1983 or at the expiry of an existing collective agreement. The regulations of Bill 15 were enacted on December 28, 1983.

Before these acts took effect, several complaints or proposals were brought forward by interested parties, including:

- The Pensions Commission of Quebec argued that a reasonable delay was required for putting the amendments to Bill 20 into effect.
- the Work Standards Commission raised concerns regarding the administrative standards for dismissal before legal retirement age, and how the policy would be applied in cases where an older worker was replaced by a younger worker.
- The impact of the Bill on policies to reduce the size of the civil service was questioned.
- A number of municipalities demanded that their police forces also be excluded from the proposed changes.
- Universities lobbied for exclusion of teaching staff, and employers' representatives lobbied for excluding officers of corporations.

None of these additional groups was in fact excluded from the provisions of the acts.

For further reference:Emmanuel E.M. Feurwerker, *The Abolition of Mandatory Retirement in Quebec,* a report commissioned by the Task Force.

The Effects of Abolition: Employment of People Aged 65 and Over

In Quebec, the percentage of the population aged 65 and over who were employed was 10.1 percent in 1975, but had fallen to 6.8 percent by 1981. By 1985, however, it was still at 6.8 percent indicating that the abolition of mandatory retirement had little or no immediate effect overall.

Quebec Pension Plan

The number of new QPP recipients by age and sex was examined between 1978 and 1985 (the numbers for 1986 are tentative). The fact that the abolition of mandatory retirement took effect at the same time as access to the plan was reduced from age 65 to age 60 explains the large drop in the percentage of new recipients aged 65, between 1983 and 1984. In 1985, the percentage of new recipients retiring after age 65 increased somewhat, which may be indicative of some effect of abolition. However, one or two years' data are likely insufficient to draw any firm conclusions.

Public Plus Private Pension Plans

Data supplied by QPP show the number of new retirees on pension. Comparing December 1984 with December 1985, the number increased by 9.1 percent — that is, from 560,905 to 611,817. This increase may in part be attributable to Bill 20, which required that people be allowed to take actuarially reduced pensions from age 60. Early retirees in 1984 and 1985 numbered 55,000 and 33,940 respectively.

Complaints Under the Act on Work Standards

One hundred and forty–six complaints were submitted to the Labour Commissioner under Articles 122.1 and 123.1 of the Act on Work Standards between 1982 and 1986. Of this number, 98 were withdrawn quickly and 35 were dismissed after adjudication.

Those withdrawn are of little relevance because in the majority of cases the cause of withdrawal is unknown. It can only be assumed that there was an agreement between the two parties or there was a settlement out of court. Thirteen complainants (two saleswomen, one hairdresser, one telephone operator, a professor, a policeman, a production coordinator, a translator and five individuals whose professions were unknown) had their complaints upheld and were able to return to work.

In the majority of cases where the Commission judged *in favour* of the complainants, it was clear that an employer wished to dismiss someone because of his age and had no other serious motive for the dismissal. Some employers even admitted that advanced age was the only motive for dismissal. Others gave reasons which appeared to have been developed after the fact, with the true reason presumably being age.

In eight decisions, the complaint was *rejected* as a direct result of the fact that the complainant had retired before the date on which the Act took effect. The Act was passed in 1982, but in the case of employees who subscribed to a private or public pension plan the date at which the Act took effect was January 1, 1983 or the expiry date of the collective agreement valid on April 1, 1982.

In two decisions, the commissioners judged that incompetence on the part of the complainants was the cause for retirement, and not the age of the retiree.

In three decisions, complaints were rejected because of the poor economic situation of the business. It was easy for the employer to prove that he had just and sufficient cause on economic grounds.

In two decisions, complaints were rejected because the employer had no specific policy on retirement. Although the commissioners are required to give any benefit of the doubt to a complainant wishing to take advantage of the measures contained in Articles 122.1 and 123.1 of the Labour Standards Act, this requires three conditions to be met:

- That the complainant be a salaried employee under the terms of the Labour Standards Act.
- That the complainant was dismissed or retired.
- That the complainant had reached or passed the age or the number of years of service after which he would be retired under applicable general or specific legislative measures; or under a collective agreement, an arbitration ruling or on the basis of the employer's retirement policy.

Therefore, if the employer has no collective agreement, no retirement plan, or no retirement policy, the third element cannot be proven. Judge Bernard Prud'homme of the Labour Tribunal, in a judgement rendered in February 1984, explained this as follows:

> The legislator aims to put an end to mandatory retirement where there are rules or established practices of this type, and has made this very clear. Has the legislator made provisions for cases in which no rules or practices exist? The answer must be in the negative. In this case, the only expression used by the legislator which could help Mr. ... was "pursuant to the employer's retirement policy". Let us suppose the case of an employer faced for the first time with an employee about to retire. It is impossible to give to the above clause a meaning which encompasses a similar situation; after all, a text can only be twisted so far.
>
> It is surely by error, by inadvertence, that the legislator, preoccupied as he was to legislate concerning forced retirement under rules or established practices, failed to provide for all possible contingencies.
>
> What confronts us is not a problem of interpretation, it is a problem of a legislative lacuna, of "casus omissus".

In another ten decisions, the complaint was rejected due to the fact that the complainant had not reached or completed the age or years of service after which he could have retired. Article 84.1 of the Labour Standards Act gives the right to the employee to remain at work even if he has reached normal retirement age. One can conclude, upon reading Articles 44.1, 44.2 and 44.4 of the Act on Supplementary Pension Plans, that the age mentioned in Article 84.1 cited above is the normal retirement age, that is to say the age at which a worker may take his full pension without actuarial penalties.

In one decision, the complaint was rejected because the employer had changed the type of work of the complainant without obliging him to retire. The Act does not forbid changes of work conditions. It only guarantees the employee the choice of remaining at work after reaching the normal retirement age. Other decisions concerning a rejection of the complaints which were heard had no relationship to Articles 122.1 and 123.1 of the Labour Standards Act.

Labour Force Participation Rates

The labour force participation rates since 1951 were examined in census data. The participation rate represents the percentage of the population at work or unemployed during the period preceding the census. Even though the questions posed varied from one census to the other, and the job search period for job seekers was extended to four weeks in 1981, the definition of the active working population or labour force is essentially unchanged.

The participation rate of women aged 65 and over has not changed greatly since 1951. They have always been a small minority, with a maximum rate at 9 percent having been reached in 1971. Moreover, the trend is not clear, since from 1951 to 1971 there was a rise followed by a comparable downturn. For the subset aged 65–69, the maximum rate was 22 percent. For women under 65, however, there has been a strong rise in participation rates.

In contrast to the participation rate of women aged 65 and over, the participation rate for men in the same age group follows a very clear trend, falling continually from 36.4 percent to 14.7 percent between 1951 and 1981. For the 65–69 subset the absolute drop is even more marked, from 58.3 percent to 21.3 percent.

The drop in male participation rates results from the combined effect of a number of factors, including: (i) a drop in agricultural employment and a corresponding rise in salaried work, which involves stricter retirement rules; (ii) a general rise in workers' incomes permitting accumulation of savings for retirement; (iii) structural changes in the economy which work against people with low levels of education; (iv) a lowering eligible age for Old Age Pension benefits from 70 to 65 between 1966 and 1971; (v) an increase in the Old Age Pension and the establishment of a Quebec Pension Plan, which paid its first benefits in 1966; and (vi) the proliferation of other supplemental pension plans. There is no agreement on the weight of each of these factors, but the importance of the increase in income for retirees is recognized, whether from universal programs for all aged people or from contributory earnings–related plans.

The Labour Force Survey (LFS) gives an overview of participation in the labour force since 1981. The trend between 1981 and 1985 evident in the data for the 65 plus age group is very irregular. (This could be a result of the small sample size from which the data were taken for the group.) By contrast, the drop in the participation rate of the 55–64 age group is not large for women, but is considerable for men. The participation rate of men 55–64 fell

from 71.6 percent in 1981 to 65.4 percent in 1985.

Information from the Quebec Bureau of Statistics gives a more detailed breakdown of participation rates by age and sex. Male participation rates start to fall at age 50, but the decline is slow at first, with a rate of 77 percent remaining at age 59. It drops more rapidly for ages in the early 60s, but than takes a large drop at age 65. That is, the rate falls from 55.1 percent at age 64 to 29.6 percent at age 65. For women, the situation is very different but nevertheless there is a marked reduction at age 65. Their participation rate is in the high 70s at age 20, but falls by about 20 percentage points into the early 30s age group. Thereafter it remains relatively stable, around 58 percent, until age 45. It then declines steadily to 27 percent at 50. Even so, there is still a marked reduction at age 65.

Considering participation rates over time, that for men aged 30 to 50 has been relatively stable and above 90 percent. For women in this age group, however, there has been a strong growth in the participation rate over the last few decades. Comparing participation rates in Quebec with those in Ontario and the United States, it is clear that Quebec rates are lower than Ontario's in all age groups. This is particularly true for women aged 60 to 64, with a rate of 22.8 percent in Quebec as compared to 32.3 percent in Ontario. The gap is even wider between women in Quebec and in the United States.

Characteristics of the Quebec Labour Force

Different participation rates relate to different socio–economic characteristics. Among men, unmarried males have a higher participation rate than married males after age 65, while the situation is reversed for the 55 to 59 and the 60–64 age groups. Although based on data only for 1981, this would seem to imply that the fall in participation rates with age is less for unmarried men than for married men. It is interesting to note that single women have the highest participation rate in all three age groups.

The difference between employed and self–employed workers is apparent. Among workers aged 65 and over, 24 percent were self–employed compared with only 11 percent in the 45 to 64 age group. It is likely, of course, that some employed workers turned to self–employment upon retirement, but this would not likely alter the implicit prediction that a higher proportion of self–employed workers continued in the labour force beyond age 65.

By profession, there are obvious similarities between the 55 to 59 and the 60 to 64 age group in the professional profiles for men and women. As people move into the 65 and over age group, however, changes definitely take place. This tends to confirm the fact that some professions retain more older workers than do other professions. For both men and women, scientific, professional and technical personnel are well represented in the 65 and over group. For men, this is also true of the sales and primary industries, but less so for women. To the extent that different areas employ different proportions of men and women, therefore, we can expect their distribution by profession to be reflected to some degree in their post–65 participation rates.

By economic sector, the proportion of male workers over 65 who are in manufacturing, construction and public works, and public administration and defence sectors is much lower than for the 55 to 64 age group. Conversely, the proportion of male workers over age 65 who are in primary industries, commerce, finance and social services is higher than for the 55 to 64 age group. For women, 45 percent of the 55 to 64 age group is concentrated in only the social services, commerce and personal services sector, and this proportion rises even further (to 59 percent) for working women aged 65 and over. At least for males, therefore, this would seem to indicate that the willingness (or ability) to work beyond age 65 depends to some degree upon the nature of the job. This is neither new nor surprising, but merely adds further weight to already existing views and expectations.

General Perspectives

The small businesses interviewed did not have pension plans. In all other cases, only minor modifications were reported as having been made in order to meet the requirements of the abolition of mandatory retirement. None of the respondents knew of any cases in which pensions had not been changed in accordance with the Act. The overall impression was that the required changes were of little concern, at least for the moment, since workers generally wish to retire earlier rather than later. The only exception to this general impression was the academic community.

Because people wish to retire earlier rather than later, respondents did not feel that the elimination of mandatory retirement was a significant economic issue. In a few cases, workers had stayed on in order to raise their subsequent pension benefits because they did not have sufficient service to qualify for full pensions. These cases were, however, very few in number and presented no particular problems for the employers. Respondents unanimously considered the abolition of mandatory retirement a response to the provision of the Charter of Rights and Freedoms.

Interests of Older and Younger Workers

In the short period of time since abolition, no significant behavioural changes have been noted. The behaviour of employees continues to be related to the nature of their occupation and to the availability of early retirement benefits. Only in the educational sector was any change noted — specifically, there was thought to have been some increase in the productivity of older workers so as to meet the requirements of their teaching load now that age was no longer a constraint.

Only in the academic community was there any conflict of interest. Younger and older age groups here may or may not express this conflict, but the administrative departments acknowledge the conflict because the mandatory retirement ban reduced positions available for recent graduates and women. In other sectors, no conflict was found, again because of the trend towards earlier retirement rather than later retirement. Although the small businesses would prefer to replace older workers with younger workers on productivity grounds, this is a problem they already face. As yet, the abolition of mandatory retirement does not seem to have aggravated their problems, though respondents felt that it could well do so in the future.

Has there been a different response by those 55–60, 60–65 and over 65? The respondents did not note any differences.

Because the overall impact was perceived to be minimal to date, no sectoral differences have been apparent. Respondents did, however, note that just as there have been different responses to early retirement by sector there could be different responses to late retirement in the future. Again, the small businesses were most concerned about the abolition of mandatory retirement aggravating their currently perceived problems with older workers. This particular sectoral difference is likely due to the absence of pension plans in small businesses. In other cases, it was felt that sector/occupations requiring heavy physical labour or monotonous and tedious tasks would be minimally affected since the desire to retire early was paramount among workers. Again, the educational sector was an exception, and concerns were expressed about the potential effect of abolition on the average age of faculty and positions available for new entrants and women. This is perhaps not surprising since teaching and/or research, particularly at the university level, are intellectually stimulating activities and frequently confer status upon the professor. In short, there are non–monetary rewards which are not present in most other occupations. As is borne out by the evidence from France, jobs requiring a high level of education are those most likely to tempt people to remain after normal retirement age, even though full pensions are available.

Given the number of openings created by normal labour turnover and the small numbers who remain after age 65, any such "replacement effect" cannot be quantified even if it does exist. The large businesses noted that, on average, only about 5 percent of the total work force continued after reaching full pension entitlement, which in some contracts was specified as age 60 and not age 65.

Again with the exception of small businesses, employers indicated no desire for younger and less experienced workers rather than older workers. Even in the universities, the emphasis appeared to be far more upon the opportunities for new blood to enter the profession rather than with the "desirability" or "undesirability" of older members as individuals.

Impact on Pension Plans and Collective Agreements

Since no law yet exists in Quebec which requires "fringe benefit" plans, any changes would be on a voluntary basis. None of the respondents have done any costing in this area, and all believed that whatever extra costs were incurred would be minimal. That is, the extra costs per worker might be high, but given the number of workers remaining after 65 the overall cost increase would be very small.

Funding and Design Consequences

Under Bill 15, a workers pension plan benefits do not increase beyond their normal maximum level even though a worker with full entitlement who continues to work must also continue to contribute. Therefore, removing the age barrier from such plans would in some cases cause a net cost increase and in other cases a net cost saving. Overall, especially given the small numbers of people staying on, the respondents with pension plans expected the effect to be neutral, and/or it would be indistinguishable from other factors involved in normal actuarial adjustments.

Have new forms of job performance criteria or assessments been introduced? All respondents reported that there had been no change in these practices as a result of the abolition of mandatory retirement. Do older workers retain traditional seniority rights for promotions, demotions, transfers and layoffs? With one exception, all workers' rights and privileges are retained beyond age 65. Have new forms of discipline or physical health review been introduced? Since no new problems have yet been noticed, no such changes have yet been made. Have any of the above changes led to union–management confrontations? Since no changes have been made, confrontations have not occurred.

The Universities

The average age of the professional staff at Quebec universities is steadily increasing. Our respondents considered this to be a pressing problem. Few openings for new entrants have been available during the past five years. According to one respondent: "The teaching staff of a university should represent all age groups, distributed evenly. This would permit staff to renew the ideas and the messages they transmit to students and bring higher education up–to–date."

The average age of university professors in Quebec was 44.5 a few years ago. It is now 46. By the year 2000 it will reach 48 unless retirement patterns change or new openings become available through the creation of new positions. The major causes of this phenomenon, according to the information gathered in interviews, are as follows:

- the lack of resources to hire younger professors;
- tenure; and
- above all, the abolition of mandatory retirement at 65.

If we are to believe the comments and responses our survey elicited, university professors are becoming complacent and entrenched.

Many administrators consider it to be very important that a solution be found. It was suggested that collective agreements as well as professors' working conditions must be modified in such a way as to set up a system of evaluation complemented by a review every five years, which would resolve cases of incompetence and free up certain positions. It was further suggested that incentives should be made available to encourage professors to retire early, starting, say, at age 55, and perhaps a new variety of connections or attachments to faculty should be considered (such as a quarter or third appointment for semi–retired professors), in order to allow such people to continue teaching or researching part–time.

It was acknowledged that new graduates have enormous difficulties entering the teaching and academic world, and that the abolition of mandatory retirement has in no way helped the situation of those young people. Rather, it was seen to have created a pressing problem.

It was also noted that the abolition of mandatory retirement would in all likelihood reinforce the imbalance between male and female teaching staff in higher education, as 76.5 percent of all such staff are still men, and only 23.5 percent women. The Ministry of Eduction is prepared to invest something in the order of $4.6 million in the educational sector to create jobs above and beyond those already existing.

The Consensus

There appears to be a general consensus that the abolition of mandatory retirement has had little impact to date. This is largely due to the desire of the great majority of the population to retire earlier rather than later, and the ability for them to do so in an age of increasingly flexible provisions for early retirement in pension plans.

It is also likely due in part to the short time period since abolition became effective. Consequently, there is a concern in some sectors that it could cause significant problems in the future. Specifically, small businesses express a deep concern that they will be adversely

affected. This would likely be a result of the fact that they have no private pension plans and, unless state plans were to provide higher pension levels, there would be little incentive and/or ability for their workers to voluntarily opt for retirement. Also, the education sector expects adverse impacts in the absence of other measures to encourage older faculty to retire. This occurs despite "adequate" pension plans because of non–monetary rewards in the profession. Finally, even though large private sector firms do not seem to expect significant adverse economic consequences in the future, they nevertheless express concern about legislation which overrides voluntary agreements made via collective bargaining. That is, their concern is on a matter of principle rather than on economic grounds.

12

The Federal Government

The Jurisdictional Authority of the Federal Parliament and Government

Many people who live and work in Ontario are subject to federal rather than provincial authority in relation to employment matters. Federal government employees, for example, are subject to federal public service legislation and regulations. Furthermore, the Canadian Constitution gives the national Parliament responsibility for regulating certain types of economic activities, such as interprovincial transportation and banking. This means that the employees of enterprises carrying on these particular activities are subject to regulation by Parliament in employment matters.

The federal government is currently in the process of changing its legislation and regulations in order to ban mandatory retirement within its jurisdictional authority. For the purposes of our study, this federal process is extremely important. First, it directly affects the retirement decision of many people who live and work in Ontario. Second, if the Ontario government chooses not to ban mandatory retirement, then the possibility will exist that Ontario employees in similar jobs but working for different employers will face different mandatory retirement regimes. For example, employees of banks will not face mandatory retirement since banks are under the federal government's authority, while employees of trust companies could still face mandatory retirement since trust companies are under provincial authority in relation to employment matters. Sometimes companies are subject to federal jurisdiction in some important respects as they are incorporated under the Federal Trust Companies Act but even federally incorporated trust companies are apt to be subject to provincial jurisdiction in employment matters. Third, the federal government's changes are the outcome of a concerted effort to elicit public opinion within a reasoned debate. These changes reflect a widespread trend to give greater recognition to individual rights concerning the retirement decision. Finally, the process of federal changes indicates the complexity of the subject, and suggests that decisions concerning modifications and exemptions will continue indefinitely into the future. The banning of mandatory retirement will be an ongoing process. It will involve important transitional developments, and its impacts will vary over time.

The Process of Political Deliberation

In this section, we turn to the process of political deliberation which resulted in the federal government's decision to implement a mandatory retirement ban. This discussion is important in order to emphasize that, while changes in legislation and regulations will continue, nevertheless, the federal government has made a firm commitment to ban mandatory retirement. This firm commitment has been based on extensive public consultation and serious thought.

The Canadian Charter of Rights and Freedoms was itself the product of widespread public discussion and professional analysis. The decision was made to include age discrimination explicitly in Section 15 as a type of discrimination that should be prohibited. While the Charter was proclaimed on April 17, 1982, the equality rights of Section 15 were not to come into force until April 17, 1985. A purpose for this delay was to give governments time to review and seek amendments to any laws on the books that failed to meet Section 15's safeguards against discrimination. In its 1985 discussion paper, *Equality Issues in Federal Law*, the federal government has stated that:

> The review brought to light a great many legislative provisions that were not so readily dealt with. Some of the distinctions made in law on grounds listed in Section 15, and on other grounds that may be protected, raise new questions about some familiar social and economic policies.
>
> Mandatory retirement is one example. Section 15 bans discrimination based on age. Yet many laws (to say nothing of many more policies and regulations sanctioned by laws) fix an age at which employees must go into retirement, regardless of the wishes some may have to stay on the job and regardless of the abilities some surely have to keep doing the job productively and safely.
>
> Because equality rights are not absolute, there is no clear answer to the question whether mandatory retirement is acceptable. Reasonable people may differ on such a significant policy question.
>
> Before making firm proposals, the Government needs to know the views of Canadians on such issues. Theirs is the free and democratic society

described in Section 1 of the Charter; theirs must be an opportunity to advise on the way the equality rights of Section 15 are applied. So this discussion paper is being published to serve as the basis for consultation with the people of Canada.

Further to its release of this discussion paper, the federal government created a House of Commons Subcommittee on Equality Rights. The purpose and role of this subcommittee have been described by John Crosbie, Minister of Justice and Attorney General of Canada, in the following terms:

> An important step was taken on January 31, 1985, when I tabled in the House of Commons a discussion paper entitled Equality Issues in Federal Law. This paper was intended to provide a basis for consultations with Canadians — before the Government acted — on the far-reaching implications of Section 15.
>
> The House of Commons took up the challenge, creating the Subcommittee on Equality Rights to offer all Canadians a forum where they could voice their hopes and concerns and to report to Parliament with recommendations. The subcommittee consulted with Canadians extensively, through oral hearings across Canada and written briefs submitted to it, and on October 25, 1985, it presented a report entitled *Equality For All*, identifying a number of federal laws and policies that it believed must be changed to bring about equal opportunity.

In its report, *Equality for All*, the parliamentary subcommittee summarized the legal aspects of the mandatory retirement subject as of 1985. The following extensive quotation is taken from this report:

> The Canadian Human Rights Act prohibits age discrimination in employment in terms that would appear, on first impression, to eliminate mandatory retirement. However there are several exceptions that drastically narrow the prohibition.
>
> Most important, the Act does not apply to a termination that is the result of an individual having reached "the normal age of retirement" for individuals working in similar positions (Section 14(c)). Therefore, if retirement at a particular age is generally accepted in a certain line of work, it will not constitute a discriminatory practice for an employer to adopt and apply that industry standard. Consequently employers will usually be able to raise a complete defence to complaints of wrongful termination on the basis of age simply by pointing to the practices of other employers. The Act has a similar exception for a trade union or other employee organization that terminates an individuals's membership in the organization (Section 9(2)).
>
> There is also a general exception to the Act's prohibition of discrimination in employment that gives limited scope for mandatory retirement policies in relation to certain kinds of jobs. In effect, an employer is permitted to discriminate on the basis of a "bona fide occupational requirement" (Section 14(a)). To fit within that phrase, a maximum age limit on employment must satisfy the double-barreled test set out by the Supreme Court of Canada in 1982, in a judgment rejecting a fixed retirement age of 60 for fire fighters (the Etobicoke Firefighters case). The retirement age must have been imposed honestly, in good faith and in the sincerely held belief that it is ... in the interest of the adequate performance of the job with all reasonable dispatch, safety and economy.
>
> It must also be reasonably necessary to assure the efficient and economical performance of the job without endangering the employees and the general public.
>
> The court also noted that this last requirement is not likely to be satisfied simply by evidence that a loss of productivity accompanies aging or, indeed, by any evidence on the effect of age on job performance that is no more than impressionistic.
>
> The onus is clearly on the employer to come up with solid technical and medical evidence to meet the test. If it cannot do so, the employer is not obliged to retain all its older employees until they decide they are ready to retire. The employer has the option of introducing a system of performance testing for all employees that would select out those no longer capable of doing the job. Such a scheme would not offend the Canadian Human Rights Act if the testing standards were reasonable in relation to the essential requirements of the job.
>
> The Canadian Human Rights Act applies to the federal Crown as employer as well as to private sector employers operating federally regulated undertakings, such as banks and airlines. However, there are two significant limitations in the Act that have the effect of giving special protection to the mandatory retirement policies of the federal government, putting such policies beyond the reach of the Canadian Human Rights Commission:
>
> 1. The Act provides that it is not a discriminatory practice if employment is terminated because an individual has reached the maximum age that applies to that employment by law (Section 14(b)). Since mandatory retirement in the public sector invariably has its basis in laws of one kind or another, be they statutes, regulations or orders, the Act can have no application to the public sector rules.
> 2. That part of the Act that includes the prohibition against age discrimination does not apply to any superannuation fund or plan established by an act of Parliament enacted before March 1, 1978 (Section 48(1)). Therefore, those retirement ages in the public service that are fixed by the terms of long established statutory superannuation plans may well be beyond question in any complaint proceedings brought under the Canadian Human Rights Act.
>
> In short, the Canadian Human Rights Act does not affect mandatory retirement in the public sector at all and affects mandatory retirement in the private sector in only a limited way because of an exception to the prohibition on age

discrimination in employment that permits forced retirement at the "normal age".

The parliamentary subcommittee reached a clear recommendation concerning mandatory retirement:

> We recommend that mandatory retirement be abolished by
>
> (a) amending the Canadian Human Rights Act so that it is no longer a defence to a complaint of age discrimination that an employee who is forced to retire has reached the "normal age of retirement"; and
>
> (b) amending the Canadian Human Rights Act so that it is no longer a defence to a complaint of age discrimination that an individual whose membership in an employee organization is terminated has reached the "normal age of retirement".
>
> These recommendations accord with the position taken by the Canadian Human Rights Commission in its comprehensive brief to the Committee.
>
> The effect of implementing these recommendations will be to make mandatory retirement a discriminatory practice in the majority of cases, capable of forming the basis of a complaint under the Canadian Human Rights Act. An employer will continue to be entitled, in appropriate circumstances, to raise the defence that an employment limitation tied to age or term of service is a bona fide occupational requirement for a particular job.
>
> We believe that, as a general proposition, the retirement policies in the federal public sector should be subject to the Canadian Human Rights Act. It is evident that the usual mandatory retirement age of 65 in the public service will not qualify as a bona fide occupational requirement because the retirement age applies irrespective of the nature of the tasks a public servant might be performing. A bona fide occupational requirement must be job-specific. It is our opinion, therefore, that the general retirement age of 65 in the public service should be removed.

After considering the subcommittee's report, the government issued a formal reply to the subcommittee's recommendations. This reply, entitled *Toward Equality*, devoted considerable space to the subject of mandatory retirement. Each element of the subcommittee's recommendations was met with specific government commitments. These are reproduced in detail below:

Recommendation

6. We recommend that mandatory retirement be abolished by:

   a) amending the Canadian Human Rights Act so that it is no longer a defence to a complaint of age discrimination that an employee who is forced to retire has reached the "normal age of retirement;" and

   b) amending the Canadian Human Rights Act so that it is no longer a defence to a complaint of age discrimination that an individual whose membership in an employee organization is terminated has reached the "normal age of retirement."

Response

The Government agrees in principle with this recommendation, subject to the comments made in the response to recommendation 8.

However, since abolishing mandatory retirement will have an impact on labour relations in the private sector, the Government will consult with private sector employers and employee organizations before taking any action, in order to determine the most effective way to implement the subcommittee's proposal.

Many collective agreements either refer directly to a retirement age or, more commonly, refer to stipulations of a company pension plan which specify an age of retirement. Most of these plans are set up under legislation that will also have to be revised to bring about maximum individual choice in retirement decisions. Consequently, to prevent any undue hardship, the Government would accompany implementation of the proposal with transitional rules that would ensure the orderly abolition of mandatory retirement in the private sector.

The Government will also work to ensure that the abolition of mandatory retirement will not have an adverse impact upon women, youth and visible minorities who are struggling to gain equal opportunity in the workplace.

Recommendation

7. We recommend that those provisions of the Public Service Superannuation Regulations providing for mandatory retirement at age 65, as well as comparable regulations affecting public servants who do not contribute to the Superannuation Account, be revoked.

Response

The President of the Treasury Board will immediately ask the Treasury Board to revoke both:

a) the provisions of the Public Service Superannuation Regulations which provide for mandatory retirement at age 65 for contributors under the Public Service Superannuation Act; and

b) corresponding provisions in the Non-Contributor Retirement Regulations.

Treasury Board hopes to establish a system to monitor the impact of the removal of mandatory retirement in a number of areas of personnel management and human resources and to provide data for use in any studies that are needed in future on this issue.

Recommendation

8. We recommend that the Canadian Human Rights Act be amended so that it applies to all mandatory retirement policies embodied in legislation, regulations or orders.

Response

The Government agrees in principle. This will be carried out as part of the general review of the Act, which will include a re-examination of the defences it makes available.

The only defence now available is the one concerning bona fide occupational requirement (BFOR). The concept of BFOR may be applied where it can be established that the age limitation is reasonably necessary to assure efficient and economical performance of the job without endangering the employee, fellow employees or the general public.

But the concept of BFOR does not necessarily include all the justifications that may provide a basis for a valid defence under Section 1 of the Charter.

The Government agrees with the subcommittee when it notes that some exceptions, in addition to BFORs, might be necessary to prevent undue hardship as a result of a general prohibition of mandatory retirement.

Therefore, in its review, the Government will identify any possible cases such as the Canadian Forces where mandatory retirement could be justified under the Charter and decide how these exceptions will be dealt with in the Canadian Human Rights Act.

Recommendation

9. We recommend that Parliament and the Government of Canada adopt measures to facilitate flexible retirement, so that individuals will have a greater degree of choice in the timing of their retirement, to complement the abolition of mandatory retirement.

Response

The Government is committed to policies facilitating flexible retirement. A number are already in place, and the Government will continue to seek ways to provide for flexible retirement for all employees.

Federal and provincial ministers have agreed on a number of proposed amendments to the Canada Pension Plan (CPP), including proposals to provide for actuarially-reduced retirement benefits as early as age 60 and actuarially-increased benefits for those choosing to start receiving them as late as age 70. While a consensus on this amendment has been reached in principle, it should be noted that a change of this nature to the CPP requires the approval of two-thirds of the provinces having two-thirds of the population of Canada in addition to the approval of Parliament. It is hoped that there will be amending legislation before Parliament in 1986 with an implementation date of January 1, 1987.

Federal public service pension plans already contain certain of the measures suggested. For example, the statute covering the largest groups, the Public Service Superannuation Act, provides for pensions as early as age 55 for those with 30 years of service or more and as early as age 60 for those with at least five years of service, which are not actuarially-reduced, as well as reduced pensions as early as age 50. It also allows continued accrual of pension benefits as long as the contributor remains in the work force, subject to maximum accrual of 35 years of pensionable service.

Within the overall context of public service pension reform, further consideration will be given to other measures which might facilitate flexible retirement. This will require consultation with employees and various decision-making authorities.

Recent and Proposed Changes by the Federal Government

In accordance with the commitments presented above, the federal government is currently in the process of banning mandatory retirement in those activities over which it has jurisdiction.

As of July 2, 1986, it changed its *Public Service Superannuation Regulations* (P.S.S.A.) to remove the previous provisions that permitted mandatory retirement in the federal public service. The P.S.S.A. has authority over the direct employees of the federal government as well as over the employees of many federally appointed boards, commissions, and corporations. Schedule A of the P.S.S.A. lists the boards, commissions, and corporations that are covered by the P.S.S.A. and, consequently, where mandatory retirement has now been banned.

Apart from the authority of the P.S.S.A., the federal government also determines the retirement age of certain public servants through other statutes that deal with specific occupations such as the Canadian Armed Forces, the RCMP, judges and individuals appointed to particular boards, commissions and tribunals. At the present time, the federal government is examining each of these statutes and regulations that currently provide for an age limit. In some cases, the federal government is considering replacing the current mandatory retirement provisions by new provisions for specific terms of appointments that could be renewable. Since the employment circumstances vary considerably among these activities, the process of change requires time for individual analysis and decisions.

It is important to note that the federal government is not intending to ban mandatory retirement in all occupations over which it has jurisdiction. The concept of exemptions for *bona fide* occupational requirements is generally accepted as a necessary component of a

mandatory retirement ban. In some cases, mandatory retirement will be retained for broad categories of jobs. For example, the federal government has considered it necessary to maintain a mandatory age of retirement in the case of the judiciary, the members of the Canadian Forces and members of the RCMP. In this regard, the *RCMP Superannuation Regulations* have been amended to replace the previous regime by a uniform retirement age of 60 for regular members of the RCMP. With respect to the judiciary, Bill C–41 raised the age of retirement for all federally appointed judges to 75. The mandatory retirement for members of the Canadian Forces remains unchanged.

Conceivably, modifications to statutes and regulations that cover particular activities could continue in the future as employment circumstances and public attitudes change.

As indicated above, the federal government has a broad constitutional authority over certain types of economic activities, apart from and in addition to the public service and federally appointed agencies. For these additional economic activities, the federal government relies upon the Canadian Human Rights Act to implement its position on mandatory retirement. It is important to note that these additional occupations include not only private sector activities such as banking and interprovincial transportation, but also certain public sector activities that have been established as independent or autonomous organizations such as Crown corporations. For these additional areas of federal responsibility, the federal government is currently considering how it should amend the Canadian Human Rights Act. It has indicated that it shall amend this Act so as to ban mandatory retirement, but at this date it has not yet done so.

For these areas of federal responsibility that are not covered by the P.S.S.A. or specific statutes, an employer is still able to enforce a mandatory retirement policy. In particular, an employer can point to paragraph 9(2) and Subsections 14(b) and 14(c) of the Canadian Human Rights Act as a defence against an employee complaint of age discrimination. Consequently, in order to implement its decision to ban mandatory retirement as far as its authority extends, the federal government is currently considering amendments to paragraph 9(2) and Subsections 14(b) and 14(c). At the present time, Subsection 14(a) allows an employer to impose mandatory retirement as a *bona fide* occupational requirement. It appears that the government will not amend Subsection 14(a). This means that, for some occupations, substantial ambiguity and uncertainty will continue. Even after the federal government has implemented the changes discussed above, we expect that considerable disagreement and litigation will continue indefinitely over whether specific occupations should have a mandatory retirement age because of a *bona fide* occupational requirement.

Subsection 14(b) remains a major defense in that an employee can be retired if he has reached the "normal age of retirement."

Quite apart from the regulations and statutes discussed above, employees under the federal government's jurisdiction are now able to contest an employer's mandatory retirement practices on the basis that these practices violate Section 15 of the Canadian Charter of Rights and Freedoms. Section 15 became effective only on April 17, 1985, and so it is not yet clear how the courts will interpret its prohibition of discrimination based on age. Only when cases have reached the Supreme Court of Canada will we begin to see the practical meaning of Section 15. Conceivably, the Supreme Court could approve of a usage of mandatory retirement in many cases as a *bona fide* occupational qualification. Conceivably, it could give considerable weight to Section 1 of the Charter which provides that Section 15 may be subject to "such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." Furthermore, the Supreme Court could interpret Section 32 narrowly, ruling that the Charter's authority is restricted to governments, and so may not cover private sector employees under federal jurisdiction.

In view of the above matters, it is not yet possible to be certain as to the future status of mandatory retirement in some of the private sector economic activities under federal jurisdiction. Already, though, the decision of the federal government to ban mandatory retirement has been implemented for those who are covered by the P.S.S.A. For many jobs, the question of

an exemption from a mandatory retirement ban as a *bona fide* occupational qualification will remain an unanswered question indefinitely. Furthermore, it is possible that changes in technology and skill requirements may alter the future answers to this question.

Another important aspect of federal changes is the likelihood of a considerable transition period as part of any new legislation. In the summer of 1986, consultations were held with the private sector, resulting in a broad agreement that a transitional period would have to accompany any change in the *status quo*. The necessity to provide a transitional period was explained by the need of both employer and employee organizations to undertake a significant review of some important components of the current industrial relations system, which have been developed on the basis of mandatory retirement.

One of the major factors recognized as justifying a phasing in arrangement is in the area of employee benefits. At present, with a mandatory retirement age in place, pensions and other benefits are geared to a designated age of retirement. Several groups have pointed out that for benefits purposes, some age standardization was necessary even with an open retirement age. In particular, consultations have demonstrated a real concern with the issue of how other benefit plans relate to the "normal age of retirement".

In order to prevent any undue hardship as a consequence of abolishing mandatory retirement, the federal government was asked prior to giving effect to the abolition of mandatory retirement, to provide the private sector with some guidance with respect to how pension and benefit plans will legally be allowed to work. The federal government is currently considering the transitional rules that would best meet this concern.

Consequently, even if the proposed amendments to the *C.H.R.A.* are tabled in the near future, a transitional period will most likely accompany the proposed changes.

13

The United States, with Particular Reference to New York State, California and Michigan

Introduction

The impact of the elimination of mandatory retirement in the various states has been similar to that in Canadian jurisdictions surveyed: a non–event. The evidence indicates that few people stay on past normal retirement age. There have been no major problems of implementation and the most controversial area concerns medical insurance benefits for the elderly, which does not revolve around the elimination of mandatory retirement per se. The latter issue is related to the overall cost of social security benefits which, in the comments of many respondents, was a prime motivation for the movement to eliminate mandatory retirement in the first place.

The earliest federal legislation in the U.S. that touched on mandatory retirement dealt with justifying a certain degree of employment–related discrimination. In 1964, Title VII of the U.S. Civil Rights Act addressed discrimination in employment on grounds other than age, allowing a degree of discrimination on the basis of a bona fide occupational qualification, or B.F.O.Q.

In 1967 the Age Discrimination in Employment Act banned age discrimination up to age 65. At the same time, it accepted the B.F.O.Q. principle in relation to age as an appropriate limiting factor in some employment decisions.

A test was developed for the B.F.O.Q. under the ADEA — the so–called *Tamiani* Test — that was endorsed by the Supreme Court in *Western Airlines, Inc.* v. *Criswell*. Briefly stated, it held that: "The age requirement must be reasonably necessary to the essence of the business operations and there must be a factual basis for believing that substantially all individuals excluded from the job by the requirement will in fact be disqualified or that it is impossible or impractical to identify those who possess a disqualifying trait except by reference to age."

In practice, the B.F.O.Q. is only available in relatively narrow circumstances. Nearly all cases in which it has been successfully invoked involve safety considerations, particularly public safety. Court decisions in the U.S. — and Canada — have proven inconsistent, however, pointing to the difficulty on the part of the employer to prove empirically the effect of aging on the performance of the essental job functions.

The ADEA was ammended in 1978 to raise the coverage of the Act to age 70 from 65 and to remove any upper limits for federal government employees. Tenured post–secondary teachers, however, were exempted from the new limit until July 1, 1982, when they too were to become subject to the ammendment.

Another change to the ADEA enacted in 1978 allowed a pension–related exemption — Section 12 (c)(1), which stated:

> Nothing in this Act shall be construed to prohibit compulsory retirement of any employee who has attained 65 years of age, and who, for the two–year period immediately before retirement, is employed in a *bona fide* executive or high policy making position, if such employee is entitled to an immediate nonforfeitable annual retirement benefit from a pension, profit sharing, savings or deferred compensation plan, or any combination of such plans, of the employer of such employee, which equals, in aggregate, at least $44,000.

The threshold benefit level was first set at $27,000. This was raised to $44,000 as of October 9, 1984. This "executive exemption" represents the response of Congress to business concerns to:

- assure predictable retirement patterns for top executives in the interests of effective over–all corporate management;
- recognize the difficulty of evaluating the performance of high level executives; and
- maintain promotion channels at the top of the corporate structure.

Because of the benefit level that must be assured, an individual forced to retire under this exemption is unlikely to suffer financial hardship.

For further reference: Peter Warrian, *Mandatory Retirement: Experiences in the United States,* a report commissioned by the Task Force.

In 1986 further amendments to the Act removed the age 70 limit but affirmed its continuation for tenured faculty subject to a new sunset clause, as follows:

> 12.(a) Nothing in this Act shall be construed to prohibit compulsory retirement of any employee who has attained 70 years of age, and who is serving under a contract of unlimited tenure (or similar arrangement providing for unlimited tenure) at an institution of higher education ...
>
> (b) The amendment (in Subsection (a)) is repealed December 31, 1993.
>
> (c) (1)The Equal Employment Opportunity Commission shall, not later than 12 months after the date of enactment of this Act, enter into an agreement with the National Academy of Sciences for the conduct of a study to analyze the potential consequences of the elimination of mandatory retirement on institutions of higher education.
>
> ...
>
> (3) The results of the study shall be reported, with recommendations, to the President and to the Congress not later than 5 years after the date of enactment of this Act.

The U.S. Congress had a number of reasons for this special treatment of university teaching staff. First, a larger percentage of university professors are likely to want to keep working beyond current retirement ages because of the significant non–monetary rewards of their work and because it is not physically demanding. Poor health and economic security, the major reasons for early retirement in other occupation groups, may not be as significant for university professors.

Unlike other employers, the limited financial resources of universities mean there are a relatively fixed number of positions to fill. If significant numbers of professors stay on, the number of faculty positions available for younger new faculty members could be reduced. This in turn could impede universities from hiring under–represented groups such as women and visible minorities.

In fact, evidence from a U.S. study on the effect on universities of the raising of the mandatory retirement age from 65 to 70 suggests that it could reduce new hirings of faculty members by 25 percent.

Tenured university professors presently enjoy great security of employment because they are practically impossible to dismiss and there is little monitoring or appraisal of their performance. If mandatory retirement were abolished, the very concept of tenure, traditionally viewed as a necessary protection of academic freedom, could be threatened. Furthermore, to enable universities to discharge incompetent tenured professors for cause, greater monitoring and appraisal of tenured professors could ensue. There may even be a need for an alternative dismissal procedure.

The slowing of new blood for the university professoriate, in the form of new faculty members, could be detrimental to the intellectual well being and research capacities of university faculties.

These concerns caused the American Association of University Professors to advocate an exemption for professors from the abolition of mandatory retirement. Congress agreed. These are the reasons for the five year exemption from the general abolition of mandatory retirement in the 1986 amendments to the ADEA, and for the further study of the problem during this period.

Since enactment of the ADEA, there has been a large increase in the number of reported court cases involving age discrimination. That Act clearly contemplates private actions, in Section 7(c)(1), which provides as follows:

> Any person aggrieved may bring a civil action in any court of competent jurisdiction for such legal and equitable relief as will effectuate the purposes of this act ...

However, no civil action may be commenced unless a complaint is first filed with the Equal Employment Opportunity Commission, the agency charged with the Act's administration, and a prescribed time period has elapsed to allow the EEOC to try to effect an informal settlement. The right of an individual to bring action is superseded if the EEOC commences court proceedings to enforce the complainant's rights under the Act.

In relation to the states, the question remains: are the states automatically bound by U.S. federal legislation in this area? Before the introduction of ADEA, there were significant differences between various state jurisdictions. As of December 1986, ten states still had mandatory retirement: Arizona, Maryland, Arkansas,

Minnesota, Colorado, Mississippi, Connecticut, Missouri, Louisiana and Nebraska.

The federal amendments superseded these states' laws as of January 1, 1987. Some minor constitutional issues were left to be resolved, such as the conflict between New York state retirement regulations and federal rules concerning minimum vesting rights, but these were not major barriers to implementation.

At the same time, the federal act of 1986 provides for further study and reports by 1993 on the exemptions for fire fighters, police and tenured university faculty.

New York State

New York statute Chapter 296 of the Laws of 1984 eliminated mandatory retirement for the vast majority of workers in New York State, but retained compulsory retirement for certain designated classes of employees, including tenured college professors, police and fire fighters. Interestingly, state law formerly stipulated a minimum pension that barred mandatory retirement where an employee had not accumulated enough service or benefits. This provision addressed the particularly difficult situation of the pension poor elderly, providing a minimum guarantee that their position would not be prejudiced by mandatory retirement provisions.

Who Stays?

Relatively few workers stay on past normal retirement age and this seems to hold true across all sectors of the New York economy. Two qualifications may be made to this generalization. First, there appears to have been a much larger impact from changing the retirement age from 65 to 70 than from eliminating it altogether. Secondly, in the traditional garment industry there was a significant increase in the number of employees working past age 65 and 70. The latter phenomenon is related to the evolution of retirement and pension plans in that industry, and the historically low wages which dictate working past age 70 as an economic necessity.

New York City

New York City has five retirement systems: for the police, fire fighters, teachers, Board of Education employees and municipal workers.

Until 1968, the city's normal retirement age was 70, with the possibility of five two–year extensions. In 1968 a new plan was introduced reducing it to age 65 with 5 possible one–year extensions. This was dropped altogether in 1983.

After the elimination of mandatory retirement in the city, very few workers stayed beyond normal retirement age. The exception was relatively short service employees with 5–10 years of service, who may have worked for an additional year or two.

The only real problem that has cropped up is among such uniformed workers as police, fire fighters and transit and corrections officers, over physical fitness. It is essentially a problem of occupational linkage with the onus on the employer. Uniformed employees retire on their 20th anniversary of service dates. New York City has been provided a seven year grace period before any case is finally determined, but in 29 years in the system less than five requests to stay on have been made.

One statutory problem has arisen. The 1986 federal amendments to the Age Discrimination in Employment Act provided:

> Section 3. Employment as Firefighter or Law Enforcement Officer; Mandatory retirement allowed provided it is pursuant to a bona fide hiring or retirement plan that is not a subterfuge to evade the purposes of this Act.
>
> Section 5(a) No later than 4 years after enactment of the Act, the Secretary of Labor and the Equal Employment Opportunity Commission shall conduct a study to determine whether physical and mental fitness tests are valid measurements of the ability and competency of police officers and fire fighters to perform the requirements of their jobs.
>
> (b) If such tests are found to be valid measurements of such ability and competency, to determine which particular types of tests most efectively measure such ability and competency.

(c) To develop recommendations with respect to specific standards that such tests, and the administration of such tests should satisfy.

Under the 1976 ERISA Article 14, a minimum pension was payable after 10 years service, or five years where there was a mandatory retirement provision. This anomoly is a constitutional issue between the state and federal governments. Under article 7 and 15 of the state law, a person could resign and request return of the contributions with a right to choose benefits under article 14 or 15. This conflict between state and federal laws and regulations is an anomaly that has yet to be sorted out.

The city plans a cap at 35 years of service, but the plan is not sufficiently mature for the actuarial increase issue to arise.

The Textile Industry

Data was provided by the Amalgamated Clothing and Textile Workers Union (ACTWU) Retirement Fund on employees in the pre– and post–1978 periods.

Under the ACTWU plan after 1976, an employee could retire after being off the job for one month; he or she could then return to the industry and keep receiving a pension. Few effects have been perceived from the 1978 and 1986 legislative changes. In fact, it is difficult to determine whether workers have retired, or simply left, picked up their pensions, then returned to work.

The industry did experience a large increase of retirees in the 62–65 age bracket. This is related to the ERISA changes that required a minimum pension after 10 years of service.

The textile industry experience is that more employees are staying on, then coming back after being off for a month. The principle reason is economic need, since most pensions are low, averaging $200 per month. As for other benefits, if a worker retires at age 62, health and group life coverage continues until age 65, when Social Security picks it up. Working retirees can qualify for full benefits after a minimum of 83.5 hours of work.

If an employee works past age 65, there is no actuarial increase. This is an incentive to retire and then return to work. More people are aware of it now, and up to 20 percent of current retirees are taking advantage of this retire–return option. It almost acts as a wage supplement reflecting as it does the low wages in the industry and the fact that employees get relatively little from income–sensitive Social Security benefits.

There is pressure also to keep skilled cutters in the industry. Employers in particular want these workers to return from pension.

The industry is downsizing so the union's major focus has been on vesting as the major issue. The coincidence of industry downsizing and ERISA changes makes it difficult to isolate the specific impact of legislative changes. Employees have been tracked to assess the actuarial implications but so far there has been no financial impact.

The University Situation

The City University of New York is a public university. The federal law postponed elimination of mandatory retirement for tenured faculty until 1993.

Under the 1986 federal amendments to the Age Discrimination in Employment Act:

Section 6(a) Special Rule for Tenured Faculty. Nothing in the Act shall be construed to prohibit compulsory retirement of any employee who has attained 70 years of age and who is serving under a contract of unlimited tenure (or similar arrangement providing for unlimited tenure) at an institution of higher learning.

(b) This amendment a) is repealed December 31, 1993.

(c) The Equal Opportunity in Employment Commission shall, not later than 12 months after the date of enactment of this Act, enter into an agreement with the National Academy of Sciences for the conduct of a study to analyze the potential consequences of the elimination of mandatory retirement on institutions of higher learning. The results of the study with recommendations will be presented not later than five years after the enactment of this Act.

At CUNY there is compulsory retirement at age 65 for tenured faculty. Mandatory retirement is enforced as a matter of public policy.

The City University of New York opposes the elimination of mandatory retirement for tenured faculty. Retention of the age 70 requirement for mandatory retirement helps to insure that the university will be permitted to construct a faculty characterized by the diversity necessary for the fulfillment of the mission of a major university. The figures are telling in themselves: prior to the era of severe budget constraints, less than 50 percent of the faculty was tenured. At present, it is estimated that over 70 percent of faculty members possess tenure. Repeal of mandatory retirement for tenured faculty could clearly skew faculty demographics away from the desired balance and thwart achievement of the university's goals for the employment of members of minority groups and women.

As a matter of public policy, the retention of the mandatory retirement age for tenured faculty is seen as less a threat to civil liberties than the ossification of a major and vital university due to the imposition of unrealistic and harmful employment policies. The existing statute does not prohibit the employment of persons over 70 on faculty, however. Indeed, Section 212 of the Retirement and Social Security Law permits the employment of persons over 70 years of age without diminution of retirement benefit or salary.

Another relevant piece of state legislation is the Early Retirement Incentive Bill, Chapter 665 of the Laws of 1984. The Early Retirement Incentive Program was intended to recognize past contributions of retirement–eligible faculty, to encourage retirement of those who desired it by offering a significant financial incentive, and to ensure faculty reinvigoration by permitting the apointment of new staff on a one–to–one basis.

Under the Early Retirement Incentive Law, over 740 CUNY faculty and support staff opted to retire as of February 1, 1986. Of this number, just under 300 were faculty, including members in their middle fifties and sixties. The university expects that the replacements for many of the 300 faculty will be younger educators in new or rapidly changing disciplines, whose training and experiences are current. In addition, the university will be offered the opportunity to vigorously pursue its affirmative action program.

At a time when public institutions of higher education are recovering from an era of severe retrenchment that saw many of the younger, less senior instructional staff bear the brunt of retrenchments, elimination of mandatory retirement would run counter to the flexibility required by the university to provide the changing variety of academic programs needed to serve its students and the economic needs of the state.

The Professional Staff Congress/CUNY are seeking amendment of the state law that retains mandatory retirement of tenured faculty at age 70 under Section 510 (b) of the New York State Education Law.

A compromise beween the two positions might be found in the provisions of Sections 210–216 of the Retirement and Social Security Law, which permit the employment or re–employment of a retired public servant who is over 70, without diminution of pension. Further, under the bylaws of the State University of New York (SUNY), which compel the retirement of a tenured member of the instructional staff at the end of the academic year following attainment of age 70, a college may, with the consent of the chancellor, extend employment six months by six months at half pay, or year by year at full pay. In other words, faculty could continue in employment at the discretion of the institution, but they would have to give up their tenure.

However, if the position of the faculty association remains that a tenured instructional staff member is to remain employed until resignation, death or removal with cause, no compromise seems possible.

CUNY has 18 colleges and the presidents of all 18 are opposed to the elimination of mandatory retirement. They want to keep it because supervision is almost impossible in the classroom and because it is next to impossible to fire a staff member with tenure.

At the same time the university is under pressure to comply with equal opportunity objectives and elimination of mandatory retirement would make it more difficult to meet affirmative action

guidelines. After age 70, a person can be rehired with the consent of the university. There are minor adjustments to the benefits, with life and Long Term Disability being dropped.

The faculty have a collective agreement, but they do not bargain over pensions. The collective bargaining rights, under state law, do not cover those over age 70.

Private universities are covered by the federal law. The trustees of CUNY have set the policy. Under the CUNY pension plan, a person can retire with reductions at age 55. Many go by age 60. There is no disincentive to stay on in the private plan because it is an annuity purchase plan.

The response of the university to the proposed elimination of mandatory retirement is to propose elimination of tenure, a stipulation that "no one is available with similar qualification", no more than two years approval at a time for extensions and no tenure appraisal after 6 years. As a matter of public policy, the university feels that the retention of the mandatory retirement age for tenured faculty is less of a threat to its achievement of its major goals and mission.

Advice

Among the advice and suggestions from respondents in New York State were the following:

- We should think about the Social Security offset if there is an elimination of mandatory retirement. They in fact have had no real problems. There has been no increase at the high end of the post–70 year olds. There were no administrative, design or funding problems.
- University administration suggests that mandatory retirement is an appropriate policy, particularly where supervision and tenure virtually prevent firings for incompetence. It is also about the only way to move people. In their system, the salaries saved will remain with the respective faculty.
- Expect that the elimination of mandatory retirement would be a relative non–event in Ontario.

California

In California too the elimination of mandatory retirement has been a relative non–event. The general trend toward early retirement continues. At the same time, there are issues that give rise to concern, in particular the provision and costs of health benefits for older workers and retirees. This involves linkages between mandatory retirement legislative amendments and social security benefits for the elderly.

Who Stays?

As in other parts of the country, relatively few people work past the normal retirement age. This is the case for state, municipal and institutional employees, traditional industries and in the educational sector.

Traditional Industries

In traditional industries such as steel and aerospace, the elimination of mandatory retirement has not been a significant issue because there is so much downsizing of the work force that retrenchment and early retirement have been the pre–occupations of unions and management.

According to the Machinists' Union, it is much too early to tell what the real impact of the elimination of mandatory retirement will be. It is hard to see the specific effects because of the general aging of the population, the impact of economic restructuring, etc. At the same time, average ages of bargaining units continue to increase, because of layoffs and seniority, etc. In the future, employers may need certain scarce skills and not have them available without competing for them.

The 22–44 age cohort is shrinking in the U.S., growing much less rapidly than the over age 60 cohort. Long term projections are for labour shortages, although we don't know if this will actually happen. In the IAM's view, the elimination of mandatory retirement came after the fact, although there are still concerns. Nonetheless, the trend to early retirement continues.

The Machinists Union, for instance, has been concerned about the potential for disciplinary, job monitoring, etc., impacts on older workers flowing from the elimination of mandatory retirement but there has not been evidence of it to date. Very few people have been staying on, so the problem has not arisen. It may be ten years before the real trend is evident.

Another perspective can be gained from the telecommunications industry. The Communication Workers of America (CWA) represent telephone system employees at Bell and AT&T, with the largest group of members in California and New York.

The average age of retirement at Bell and AT&T has increased slightly from about age 60 ten years ago to age 62 now. However, what proportion of that is related to layoffs and what proportion to elimination of mandatory retirement cannot be stated. It may also be inflation fears and divorce rates.

Less than 1 percent of the current work force is staying on. This is confirmed by the most recent employee data, which also indicate that more older women than men are staying on.

In 1980 the CWA did a survey of their retirees. It showed that health and family considerations were more important than elimination of mandatory retirement in actual retirement decisions. As well, home ownership was important. Of those retiring in 1980, 38.4 percent felt forced to retire, 56.1 percent said they could have worked on.

When asked about reasons in the decision to retire, the respondents rated as very important:

1. Personal health;
2. Desire to spend more time with spouse;
3. Relief from pressures at work;
4. Desire to rest and relax; and
5. Spend more time in lesiure activities other than travel.

The factors rated as least important were:

1. Desire to start a new career;
2. Distance to travel to work;
3. Health of a family member;
4. Desire to give young workers a job; and
5. Being unhappy with your job.

For the CWA, in future it will be difficult to peg the normal retirement age, because more will be working longer. The have nots will work on (e.g. divorced women, illegal aliens, etc.) and the haves will retire even earlier. In turn the government will try to pressure people to stay on, to relieve the problems of Social Security funding. Workers will lose in the long run. Most pensions are now defined benefits. With the elimination of a normal retirement age, it will be more difficult to negotiate funding and there will be pressures to convert to a defined contribution system. The result will be that workers get less from, while paying more for, their pensions. The proposals are already out for Cash and Other Defined Annuities, ESOPS, etc. In the long run workers will pay the costs.

The Age Discrimination in Employment Act dictates an equivalence of benefits. The regulations require the same insurance benefits for those over or under age 65 with "equivalent value". That may mean an actuarial reduction of 8 percent p.a. after age 65 or an equivalent cash premium, whatever level of benefits that provides. Long Term Disability benefits can be reduced after age 65. Older workers can opt for Medicare or private carrier benefits.

Medical benefits for retirees over or under age 65 may be a growing issue. There is a general crisis in the cost of medical benefits in the U.S., with a huge problem seen down the road in covering 1) early retirees' benefits until they reach age 65 and are covered by Medicare; and 2) coverage for current retirees. Many plans have a "carve out" or "wrap around" with the private plan making up the difference between the Medicare schedule of fees and the actual doctors' charges. As Medicare funding has been held down in recent years, this gap and hence the liabilities for employers has been growing. The cost of such carve outs has risen sharply. According to the Internal Revenue Service there is a potential $140 billion of unfunded liabilities for retirees' insurance hanging over employers. For those working past age 65, no carve out is

allowed. They become a full cost liability on the private plan.

Early retirees are covered by the Consolidated Omnibus Budget Reconciliation Act of 1986 (COBRA), which mandates employers to extend group life coverage to retirees under the age of 65. Employers, if retirees are not already covered, must offer the coverage to the retirees at the group coverage rate. It is mandated for an initial 60 days, until the employee makes an election. Afterwards, the retired employee has access to coverage at the group rate which represents a considerable saving from their having to go and get individual private coverage for medical, dental and drugs.

At age 65 they qualify for medicare. If the employer has group coverage for active employees over the age of 65, then the employee can request that, but only if there is already a group plan. This flows from the Tax Equity and Fiscal Responsibility Act (TEFRA) of 1983. But there is little real difference between jurisdictions in the private sector. In California there tend to be more Kaiser plans for HMO coverage for medical benefits, as opposed to New York where there are fewer and Michigan, which has even fewer still.

Public Employees

The state of California had state laws covering elimination of mandatory retirement prior to the federal legislation. A 1983 Supreme Court case taken by the Equal Employment Opportunity Office versus the state of Wyoming was the catalytic event. While compulsory retirement laws stayed on the statute book until 1983 in California, local authorities were increasingly reluctant to enforce it.

A 1983 state amendment eliminated mandatory retirement for "miscellaneous" employees, meaning the non–safety groups. Subsequently a consent decree was agreed to through the state courts whereby safety officers would not be required to retire prior to age 70 and Highway Patrol officers at age 60.

California has three retirement systems for its public employees: the Public Employees Retirement System (PERS) covering state, municipal, utilities, and non–teaching school employees; the University and Colleges Retirement System (UCRS) for university faculty; and the School Teachers Retirement System (STRS) for grade school, high school and community college teachers. There are exemptions to the elimination of mandatory retirement under PERS for bona fide occupational groups like fire and police.

There has been little actual change in employees' behaviour after the elimination of mandatory retirement. Those who would want to work on past the normal retirement age can now do so. However, this group in itself has not increased in size.

The trend is still towards early rather than later retirement. A golden handshake system has reinforced this trend. With minimum age 55, PERS members can retire and get two extra years service credits. This has had a greater impact than the elimination of mandatory retirement. The handshakes are extended to all occupational groups, and not just managers. Otherwise, the system would risk losing its tax exempt status if the Internal Revenue Service found discrimination.

There have not been any studies on how many stay on but it is only a handful. The reasons for this include the fact that PERS gives a good pension. The average leaving age is just under 60 years old. The benefit formula is enhanced up to age 63, then becomes a disincentive. If they work on they continue to accrue, but there is no actuarial adjustment for going later.

There have been no funding, design or administrative problems flowing from the elimination of mandatory retirement. The PERS has over 500,000 active members, over 200,000 annuitants, and over $42 billion in assets. Therefore the impact of the few that stay on is minuscule.

The California Highway Patrol has favoured retention of mandatory retirement throughout. In 1967 the CHPS wanted to lower mandatory retirement to age 60. The basis for this was that everyone on the active force is subject to the "full duty" concept. They must all be physically fit to go out on patrol, right up to and including the Commissioner. There are no defined desk jobs. When the mandatory retirement age was

reduced to 60, there were also improvements made in benefits and funding.

There was criticism of the mandatory retirement provision around 1980 and there were legislative hearings, but the criticism did not come from within their own ranks.

In 1984, after the federal EEOC complaint, the CHPS entered into the consent decree along with other agencies and agreed not to apply the age 60 rule, though it stayed on the statute book. A very few officers worked past age 60, but only for a few months or a year. There was one individual, a Captain, who worked up to age 63.

There was no mandatory retirement in California until the 1986 ADE Act with its exemption for police. This put mandatory retirement back into place again. Subsequently, the Highway Patrol got the Consent decree amended in the light of the 1986 federal law.

Those who did work on generally had long service. Some were worried about inflation, some were recently married and some were just plain too stubborn to leave. The Highway Patrol has far more officers going on pension as a result of disabilities than normal service retirement.

This fact reinforces the concern about keeping the mandatory retirement age provision as a matter of personal safety as well as public safety.

The features of the Highway Patrol pension plan reinforce early retirement. The benefit and service provisions and the 75 percent of pre–retirement earnings limit, both overlap in most cases around age 55–56.

The advice of the pension benefits personnel is against omitting the senior officers from the mandatory retirement provision. If there is a different rule for senior officers, it creates a division and over time an anomoly because the senior officers get the same pension, disability and other benefits as the others.

In California, as in most American jurisdictions, state employees do not have collective bargaining rights over pensions. The only significant exception is Connecticut. It does not exist in New York, Michigan or California.

Some state, county and municipal employees work past age 65. Virtually none work past 70. Many states have more liberal retirement provision such as retirement at age 60 and 25 years of service. The exception is "safety officers" i.e., police, fire fighters, corrections and psychiatric nurses. Most go at the normal retirement age, particularly in times when employment is good. The availability of alternate employment opportunities is very important in retirement decisions. Many workers want to begin a second career. If employment is bad, they stay on. Most state employees with long service retire at an early age *if* inflation is down and employment is up.

The Age Discrimination in Employment Act, with its recent changes, has created serious issues respecting social security and negotiated benefits. Because there can no longer be discrimination in availability of benefits, older or retired workers cannot have less than their negotiated benefit levels. In the past, Social Security entitlements provided a floor with negotiated plans constituting a make–up, though secondary support system. The new situation is that Medicare will be secondary and the negotiated benefits the primary support system. If a lot of workers stay on the costs of benefits will therefore explode. This could become a cost issue between the parties. The union is concerned that it may become a barrier to the hiring of older people. Some observers believe that the long run solution will be further legislation. Benefits for retirees may not now be a vested and guaranteed benefit, in the light of the adverse outcome for retirees in the LTV–USWA court case. In future these will probably be stipulated as guaranted benefits under ERISA and be able to be funded.

The elimination of mandatory retirement required age references in plans to be eliminated, but these were simply administrative changes.

About 95 percent of the American Federation of State, County and Municipal Employees' pension plans provide for continual accrual of benefits past age 65 until actual retirement. In the private sector, typically accrual ends at age 65 and actuarial increases after that. At the same time, many private industrial plans limit accrual to a

capped length of service, e.g., 30 years, but this is not found to constitute age discrimination. In fact, actuarial increase may very well produce a higher level of final benefits than simple continual accrual.

Public plans have an additional problem with the definition of "earnings". Typically, most private plans are based on *service* while public plans depend on *earnings*. Often the definition of earnings only goes up to the normal retirement age.

One additional union concern about costs and benefits of existing plans as affected by legislation is in situations where a specific plan has a defined COLA with specific inflation protection provisions, in which case an employer could make savings if people work later.

Educational Sector

The educational sector represents a huge proportion of the California economy. For this reason, respondents were surveyed in the public, high school and university systems.

There has been no change in the patterns of retirees from the University of California Retirement System since the raising of the mandatory retirement age from 65 to 70 in 1978. The only shift that can be detected is related to the rate of inflation. If inflation rises rapidly, people tend to stay on, in spite of the 75 percent inflation protection provision in the University of California plan.

The ease with which the mandatory retirement issue is addressed at the University of California Berkeley is probably a function of the type of institution and the kind of faculty they have.

The University of California Berkeley is top heavy with senior, prestigious faculty members. They all recognize the importance of new blood to the university. Therefore there is no resistance to senior faculty retiring. Many go on to emeritus status, usually with enough projects and research funding to make it a zero financial impact. Again, this may be a reflection of the kind of institution Berkeley is. As such a major graduate centre, faculty at Berkeley always have projects they want to do. The only difference is that they do not spend the time in the classroom as they did before retirement.

At the University of California there is some concern with accelerating the retirement of some older faculty who it is perceived may not be fully carrying their weight. There have been some attempts to buy people out. As well there is a concern that there will be a huge number of faculty retiring in the 1990s. In addition there is the obvious need to rejuvenate the institution.

There are no great fears that the elimination of mandatory retirement would cause huge disruptions in the university, but at the same time a feeling that it would not be a good idea. This is true not only at Berkeley but across the University of California system.

According to respondents, most members of the Academic Senate of the University of California favour retention of mandatory retirement for tenured faculty, based on the unique situation they occupy, in that it is much harder to monitor and assess the adequacy of their job performance than it is for blue collar workers.

There is not the confrontational relationship between the administration and the Faculty Association that there is at CUNY. It is not a contentious issue, except in specific rare cases, usually in small departments.

For instance, the Faculty Association has sought to get incremental improvements in the pension plan (UCRS), but elimination of mandatory retirement has not been an issue. The Faculty Association has not taken any official position on elimination of mandatory retirement. As an abstract issue people have some negative feelings about it, but as a practical matter they do not get worked up about it.

There have been some problems linking to Social Security. The Social Security benefits are not now indexed as they once were, so there is less interest in the makeup which used to be fully indexed. There is one outstanding problem with the lack of adequate nursing home coverage insurance, which neither Berkeley nor Harvard have solved. As mentioned above, this is another aspect of the problem of the cost of medical coverage for the elderly in the United States.

Neither is the issue of elimination of mandatory retirement perceived to be a major problem for the office of the Assistant Chancellor for Affirmative Action and Special Projects.

Also, within the University of California system, there is mandatory retirement for executives at age 67, under an exemption for bona fide executives and policy level decision–makers. They file under an exemption, but it has not been tested in court and they don't know if it will hold up to a legal test.

It has not been found necessary to introduce additional early retirement incentives in the University of California system. In general the UCRS tracks the PERS plan amendments, but when the PERS introduced enhanced golden handshakes, UCRS refused to follow suit.

Some respondents suggested that perhaps it is related to the California environment, but they have found no problem whatsoever in getting people to retire. There are recalls, but their total number is not large.

The focus of the elimination of mandatory retirement for California primary, secondary and community college teachers has been the "tenure" system. They have fought for a relative concept of tenure that guaranteed orderly dismissal: after three contracts a California teacher had a right of just cause for dismissal hearing.

In the past, this form of tenure phased out at age 65. Afterwards, teachers could be renewed under contract on a yearly basis, subject to a physical fitness test. In effect, the school Districts had a right of non–reemployment and some in fact applied this as a mandatory retirement policy.

In 1978, the threat of imposition of the federal law raising the retirement age to 70, caused school districts and state legislators to change. A 1982 state bill removed language referring to the loss of permanent status at age 70 from the California Education Code (45906). As a result teachers since that time could only be removed through due process. The old physical tests were eliminated and a number of criteria were introduced as grounds. Also, the administration has to document its case. This was codified through Bill 398.

In fact, very few teachers stay on. California has had a problem with declining enrollments in a number of school districts, and subsequent teacher surpluses. As a result, there have been an impetus to introduce enhanced early retirement at the same time that there have ben few new hires. In 1972 the retirement law was amended under the Barnes Act to increase the benefit formula, which is age sensitive, from 1.67 times years of service at age 60 to 2.0 percent at age 60. Funding was also improved. As a result the average age of retirement has actually gone down.

In fact, earlier retirement was a bigger factor than elimination of mandatory retirement.

The pressure from California teachers is to still further improve early retirement. Currently they are trying to get the same golden handshake provision that state employees have. They are also trying to achieve 25 years and out at age 50 with no actuarial reduction.

There is a funding problem, related to a past practice of not funding until required under the Barnes Act, but this problem does not arise from the elimination of mandatory retirement per se. No other funding, design or administrative problems have arisen.

With elimination of mandatory retirement, School Districts have a number of incentives to encourage teachers to retire early, such as: medical benefit coverage, a retirement contract with partial employment, reduced workload, easing the age 50–55 actuarial reductions, unreduced retirement for those with over 30 years of service, exit bonuses and annuity programs. This range of options means that school Districts are not completely locked in. In general, abolition has not created a large problem and it has given teachers new rights over and against arbitrary dismissal.

Based on surveys done by the NEA, most teachers across the country still want to retire earlier rather than later.

NEA has never heard of any design, funding or major administrative problems flowing from elimination of mandatory retirement. Neither has medical or job performance monitoring arisen as a significant issue at the national level.

Michigan

Michigan's experience with the elimination of mandatory retirement may not be particularly helpful. The UAW, which dominates private collective bargaining with the auto companies, in the past negotiated mandatory retirement at age 68, rather than 65. Downsizing in the auto industry has focused recent efforts toward earlier retirement. The only controversy over the raising of the retirement age has been in the crediting of pension service between age 68 and 70.

In the public sector, Michigan never had mandatory retirement at age 65. Historically, it was decreed at 70. The lifting of the age 70 cap also brought an unresolved constitutional question about whether the federal statute will be implemented at the state level.

Who Stays Past 65?

In the auto industry and the public sector the number of employees staying on past age 65 is less than 1 percent of the work force. The foregoing data are for all employees, production, office and management staff. The UAW suggests that virtually no blue–collar assembly line workers are numbered among those who have been staying past the normal retirement age. Similar results were reported for public sector representatives of state government and local school boards and municipalities. The consistent citation was that less than 1 percent of the work force was comprised of those staying on past 65.

The state of Michigan was not heavily impacted by the 1978 changes. There is some question remaining about the applicability of the most recent federal law in the state. However, informally, the state as employer has lifted the age 70 requirement. The State Retirement Board contacted each individual due to retire at age 70 and notified them of their options. As an example, every single person employed by the Department of Labour who was in this position withdrew any previous notice of intent to retire. However, the numbers involved are less than 20 people. The current state plan is targeted at an age and service formula of a total of 80. In now lifting the limit, they have enriched the incentive to retire early. They did not get as many retiring as they thought they would. However, the median age of retirement in Michigan is now about 64 years.

In other parts of the public sector, such as school board, hospital, county and municipal employees, there are reported to be only a few areas where employees will work past age 70, for instance part–time, split shifts in food services, some office and clerical. Most who work past age 70 are part–time employees in smaller communities.

Personnel staff for the state government advised that Ontario could expect some change of attitude from those in their late 60s and at age 70. The jury is still out on whether there will be major long term behavioral changes.

Collective Agreements and Bargaining

Considering the 1978–86 period, which saw the mandatory retirement age rise from 65 to 70, the only major controversy was the crediting of service for pension purposes for employees working beyond age 65. In other words, the issue was the cost of continuing accrual of pension benefits. In the auto industry, where 68 had been agreed to as mandatory retirement age, all pension plans credited service up to that age. The only controversy was over the crediting of these last two years.

The administration of the 1978 legislation was not consistent. The Department of Labor's interpretation was that the employer was not required to pay for accrual of pension service past age 68. The EEOC, on the other hand, ruled that employers were obligated. The impass held until passage of the 1986 legislation. Congress gave employers a choice: they could pay for additional credits *or* they could give an actuarial increase for those staying past age 65. The UAW doubts there will be a significant controversy over cost. Employers are more concerned over the prospect of termination procedures and litigation if significant numbers of people stay past age 65 or 70.

Another problem area concerned the continuation of employee benefits for workers staying on past age 65. In fact, employers and plans have adapted. Under the 1978 law employers were told that if they could demonstrate a significant cost effect, they could get permission to grant lesser benefits to older workers. In practice, compliance has been very good and no UAW employer has bothered to try to seek an exemption.

Long Term Disability has been limited in the GM plan. If an employee is injured after reaching aged 63, Long Term Disability terminates at their 65th birthday month. It is adjusted downwards for over 65–year–olds. Now, in the light of the 1987 changes, amendment of the plan will be required. It is not yet clear what the final result will be. Some believe that Long Term Disability benefits for over 65–year–olds will be limited to 1 year.

Group Life benefits start reducing at age 65, whether the employee is retired or not. It reduces at the rate of 2 percent per month after age 65, with a limit of 1.5 percent times years of service.

A third issue emanating from the legislation was the choice that employers had to give employees — and their spouses — who worked past age 65. It has generally been assumed that Medicare would be primary for those over age 65. Few of their members have chosen to rely primarily on Medicare, because the negotiated plans are more generous and have fewer deductibles. There have been few inquiries about this issue and it doesn't appear to be a problem.

University Sector

At Wayne State University the retirement age was 70, however, age 65 was taken as the early retirement age. The 1978 changes had a psychological impact, sparking a greater variance in retirement behaviour with less concentration on age 65. The end of previous early retirement under the age of 65 can be attributed to the 1978 changes. It has resulted in new levels of support for new supplements or enriched early retirement for faculty.

At Wayne State University there is an American Association of University Professors (AAUP) collective agreement. The employer sponsored pension plan provides for retirement at age 60 with 1/90th of salary for every year of service and a bridge benefit till age 70, which is forfeited if not collected. The administration uses incentives to move people and encourage flexibility. However, the employees who leave tend to be those with alternatives, such as other institutions or consulting. Those the administration may have wanted to move out are still on site.

For faculty, as for others, Social Security provisions act as a disincentive because earning income past the age of 65 works against an individual's advantage in terms of the receipt of benefits. This has its greatest impact on blue collar workers.

Advice

Union and management, private and public sector representatives all stated that the abolition of mandatory retirement was not a major problem. Several caveats were offered, however. Performance and productivity issues may arise for workers who stay on. Employers are concerned about the mounting costs of medical and sickness benefits, which would worsen if more stayed on. Unions are concerned that the current legislation could provoke a negative reaction over the youth employment issue, if more people understood it. Inevitably there will be some constriction of job opportunities for younger workers. The appeal of enhanced early retirement benefits introduced in recent years involved collective bargaining trade–offs with other items; the appeal to the membership was that these benefits were to improve job opportunities for younger members. This is how they were sold to the membership. If this is undermined, there could be a reaction.

PART 3

Implementing A Ban Of Mandatory Retirement

Contents

14

Exceptions to a Mandatory Retirement Ban

Introduction

The Ontario Court of Appeal has indicated that the qualifications in the Ontario Human Rights Code on the protection against discrimination may themselves be challenged for violating the anti–discrimination directives of Section 15 of the Canadian Charter of Rights and Freedoms. Section 9(a) of the Code, limiting the definition of "age" for the purposes of the prohibition of age discrimination in employment to those between 18 and 65 years of age, could conceivably be struck down by a court, as itself embodying age discrimination, thereby opening up the definition by judicial *fiat*. This could happen if a party relying on that qualification were unable to convince a court that confining protection to those between 18 and 65 was a reasonable limit that "can be demonstrably justified in a free and democratic society", in the sense of Section 1 of the Charter. A number of Ontario universities were able to convince an Ontario Supreme Court judge, in *Re McKinney & University of Guelph*, that there was such a justification at least in relation to the employment of university faculty. The Supreme Court of Canada will have the final word on whether the judicial evaluation and pruning of human rights legislation in light of the Charter is proper and, if so, what qualifications on the protection of such legislation will be supportable. Until those issues are definitively resolved, it would be wise to keep the Charter in mind when considering the possible exceptions to any general ban on mandatory retirement as those exceptions may ultimately have to be defended as reasonable limitations on the constitutional right to equality without discrimination on the basis of age set out in Section 15 of the Charter. For a fuller discussion of the Charter considerations see Chapter 1 of this report.

For further reference: Colin H.H. McNairn, *Life Without Mandatory Retirement: The Legal Regime*, a report commissioned by the Task Force.

Bona Fide Occupational Qualification

Most Canadian human rights legislation contains an exception from the prohibition of discrimination in employment that applies whenever the discrimination is the result of a reasonable or *bona fide* occupational requirement or qualification (a "B.F.O.Q."). The actual wording of the exception varies somewhat from jurisdiction to jurisdiction.

The B.F.O.Q. concept has its origin in Title VII of the U.S. Civil Rights Act, 1964, which deals with discrimination in employment on grounds other than age. When this federal legislation was supplemented in 1967 by the Age Discrimination in Employment Act, the B.F.O.Q. exception was carried forward as equally appropriate in relation to the age factor in employment decisions.

Under the Ontario Human Rights Code the B.F.O.Q. exception, as applied to age discrimination, takes the following form:

> 23.(1) The right ... to equal treatment with respect to employment is not infringed where,
>
> ...
>
> (b) the discrimination in employment is for reasons of age ... if the age ..., of the applicant is a reasonable and *bona fide* qualification because of the nature of the employment.

The use of the word "applicant" suggests that the exception is intended to operate in relation to discrimination at the job entry stage — for example a requirement that a first time bus driver be no more than 40 years of age. The predecessor of this provision was clearly *not* so limited nor is the B.F.O.Q. exception in other Canadian jurisdictions worded in a way that would make it subject to such a narrow application.

If the Code is to be amended to prohibit age discrimination against all older workers (rather than just those up to age 65), the B.F.O.Q. exception will assume added importance. If it is to effectively isolate some occupational categories from the general prohibition, as the latter affects the practice of mandatory retirement, then Section 23(1)(b) of the Code should be amended to make it clear that it extends to termination of employment. Otherwise, there will be serious doubt as to whether the B.F.O.Q.

principle will modify any ban on mandatory retirement in Ontario.

Assuming that mandatory retirement should and can be justifiable, in appropriate circumstances, on B.F.O.Q. grounds, it may be useful to summarize the scope of age–related B.F.O.Q.'s as defined by the courts and human rights tribunals.

The Subjective Test

In *Ontario Human Rights Commission* v. *Etobicoke* (the *Etobicoke Firefighters* case), the Supreme Court of Canada stated a two–pronged test for a legitimate B.F.O.Q., the first element of which was put in these subjective terms:

> To be a B.F.O.Q. a limitation, such as mandatory retirement at a fixed age, must be imposed honestly, in good faith, and in the sincerely held belief that such limitation is imposed in the interests of the adequate performance of the work involved with all reasonable dispatch, safety and economy, and not for ulterior or extraneous reasons aimed at objectives which could defeat the purpose of the Code.

This part of the test will usually be met with little difficulty as it simply requires that the employer have acted without some devious purpose unrelated to ensuring that the job be done efficiently and safely. That requirement would normally be satisfied if the employer had a retirement rule that it was applying in conformity with an established and consistent pattern of administration.

The Objective Test

The *Etobicoke Firefighters* case also stands for the proposition that a B.F.O.Q. must be:

> related in an objective sense to the performance of the employment concerned, in that it is reasonably necessary to assure the efficient and economical performance of the job without endangering the employee, his fellow employees and the general public.

The test developed under the U.S. Age Discrimination in Employment Act (the so–called *Tamiani* test) and endorsed by the Supreme Court in *Western Air Lines, Inc.* v. *Criswell* contains similar elements. It may be stated as follows:

> The age requirement must be reasonably necessary to the essence of the business operations and there must be a factual basis for believing that substantially all individuals excluded from the job by the requirement will in fact be disqualified or that it is impossible or impractical to identify those who possess a disqualifying trait except by reference to age.

The Federal Court of Appeal for Canada has applied this latter test as a logical extension to that in the *Etobicoke Firefighters* case. It introduces the additional inquiry as to whether there are acceptable alternatives to an age–based requirement that might be used to select out unsuitable persons on an individual basis.

The Burden of Proof

The *Etobicoke Firefighters* decision makes it clear that the burden of proof to establish that a job requirement, which is *prima facie* discriminatory, is a B.F.O.Q. rests with the employer; proof must be in accordance with the ordinary civil standard, that is on a balance of probabilities. If there is a public safety component to the job in question it may be easier for the employer to satisfy the burden but the onus of proof does not shift in such a case to the employee.

Sufficiency of Evidence

An employer will not be able to satisfy the burden of proof in most cases except by statistical and scientific evidence on the effect of aging on the ability to perform the particular job. In the *Etobicoke Firefighters* case the Supreme Court has signalled that impressionistic evidence of that effect is likely to fall short of the mark.

The Terms of a Collective Agreement as Support for a B.F.O.Q.

The fact that an employer and its employees, through their bargaining agent, may have agreed on the reasonableness of a particular retirement age for those engaged in a certain line of work will not support the proposition that age is a B.F.O.Q. in that context. Again the judicial authority is provided by the *Etobicoke Firefighters* decision.

What is an Occupation?

U.S. authorities are divided on the issue of whether an employer who wishes to invoke a B.F.O.Q. must show that age is relevant to the kinds of duties performed by the affected

employee or whether it is enough to show that age is relevant to a general class of workers to which the employee belongs. The single Canadian case in point comes down on the side of the first approach. In *Winnipeg* v. *Olegski* the complainant was a deputy police chief retired at age 60 against his wishes. The city maintained that 60 was the appropriate termination age for peace officers, without regard to rank, since their job is to respond to emergencies that may be hazardous and stressful and require physical strength and agility from the responding officer. The Manitoba Court of Appeal held, however, that the particular, more sedentary responsibilities of a deputy chief had to be considered and, on that basis, supported the claim of age discrimination.

These general principles relating to the B.F.O.Q. exception make it clear that it is only available in relatively narrow circumstances. Nearly all the cases in which it has been successfully invoked involve safety considerations, most commonly the safety of the public. The result of the decisions in Canada and the United States have been inconsistent. This is perhaps to be expected given the significance to the outcome of the employer's evidence on the effect of aging on job performance and given the inadequacy of individual testing. A reference to some of the Canadian decisions will demonstrate the unpredictability in this area:

- A firefighter in Etobicoke cannot be retired at 60 years of age (the *Etobicoke Firefighters* case).
- A firefighter in Moose Jaw can be retired at 62 years of age (the *City of Moose Jaw* v. *Roy Day*).
- A fire marshall in Saskatoon can be retired at 60 years of age (*Craig* v. *City of Saskatoon*).
- A deputy police chief in Winnipeg cannot be retired at 60 years of age (*Winnipeg* v. *Ogelski*).
- A staff inspector in the same police department can be retired at 60 years of age (*Finlayson* v. *City of Winnipeg*).
- A school bus driver in Manitoba cannot be retired at 65 years of age (*Delamere* v. *Inter–Mountain School Division*).
- A bus company operating in Central Canada can restrict those whom it hires as drivers to individuals who are under 40 years of age (*Canadian Human Rights Commission* v. *Voyageur Colonial Limited*).
- A bus company operating in Southwestern Ontario cannot restrict those whom it hires as drivers to individuals who are under 35 years of age (*McCreary* v. *Greyhound Lines of Canada Ltd*).

Since there is little certainty in the practical application of the B.F.O.Q. exception it would be wrong to conclude, as some have done, that it validates termination at a fixed age of those in positions such as airline pilot, bus driver, policeman, fire fighter and prison guard. At best, it *may* protect a mandatory retirement policy in respect of a job of that kind. In practice, it will be difficult for an employer to marshal sufficient evidence to sustain the use of age as a proxy for safety–related job requirements.

Mandatory Retirement of Pension Plan Participants

There are no exceptions from the Human Rights Code's present limited prohibition of age discrimination that would allow mandatory retirement if the latter were provided for under the terms of a pension or superannuation plan. Section 24 of the Code, which permits certain age and other distinctions in pension or superannuation plans or group insurance contracts, does not have this effect.

In New Brunswick, where age discrimination is prohibited without any upper age limit, there is a broad exception from that prohibition, in Section 3(6)(a) of the Human Rights Act, in respect of:

> ... the termination of employment or refusal to employ because of the terms and conditions of any *bona fide* retirement or pension plan.

If such a plan exists, an employee who is a participant may be retired pursuant to a provision of the plan that requires retirement at a fixed age. This affords an opportunity to an employer, acting unilaterally, or to an employer and a union, through the collective bargaining process, to structure the terms of a pension plan

so that employees who are plan members can be terminated, without violating the Human Rights Act, at a pre–determined stage of their working careers. The qualification that the plan must be *bona fide* imposes some limitation. But so long as the plan provides real retirement benefits, it may be expected to pass muster even if a motive for introducing the plan was to make it possible to curtail the number of older workers. It is clearly immaterial that an employee who is retired pursuant to the plan may have no significant pension accruals.

A pension plan exception as broadly based as that in New Brunswick would seem to undermine the general ban on mandatory retirement since that policy is particularly prevalent in those situations where there is a pension plan.

The U.S. Age Discrimination in Employment Act also contains a pension–related exemption. Section 12 (c)(1) of that Act provides as follows:

> Nothing in this Act shall be construed to prohibit compulsory retirement of any employee who has attained 65 years of age, and who, for the two–year period immediately before retirement, is employed in a *bona fide* executive or high policy making position, if such employee is entitled to an immediate nonforfeitable annual retirement benefit from a pension, profit sharing, savings or deferred compensation plan, or any combination of such plans, of the employer of such employee, which equals, in aggregate, at least $44,000.

The threshold benefit level was $27,000 in 1978 when this section was first enacted. That amount was raised to $44,000 as of October 9, 1984.

This "executive exemption" represents the response of Congress to business concerns to:

- assure predictable retirement patterns for top executives in the interests of effective over–all corporate management;
- recognize the difficulty of evaluating the performance of high level executives; and
- maintain promotion channels at the top of the corporate structure.

Because of the benefit level that must be first assured, an individual forced to retire pursuant to this exemption is unlikely to suffer financial hardship.

The interpretative questions relating to the executive exemption that have been litigated have to do with the scope of the expression "*bona fide* executive or high policy making position".

Preferred Class Beneficiaries

Section 14 of the Human Rights Code provides that: "A right ... to non–discrimination because of age is not infringed where an age of sixty–five years or over is a requirement, qualification or consideration for preferential treatment."

In the case of *Re McKinney & University of Guelph* the Attorney General for Ontario argued that since individuals aged 65 and over have a preferred status under the province's retirement welfare system this section would take members of that group outside the age discrimination prohibition of the Code even if it were not limited to those under 65. This argument did not find favour with the court since:

> ... the fact that age 65 is the threshold for the conferral of many retirement benefits does not, in itself, legitimize disparate treatment in employment for those who reach age 65.

Tenured University Professors

The U.S. Age Discrimination in Employment Act was amended in 1978 to raise the coverage of the Act from age 65 to age 70 (and to remove any upper limit for federal government employees). But tenured post–secondary teachers were not to be subject to the new limit until July 1, 1982. From that date such teachers cannot be forced to retire before the age of 70.

The 1986 amendments to the Act remove the age 70 limit generally but affirm its continuation for tenured faculty subject to a new sunset clause, as follows:

> 12.(a) Nothing in this Act shall be construed to prohibit compulsory retirement of any employee who has attained 70 years of age, and who is serving under a contract of unlimited tenure (or similar arrangement providing for unlimited tenure) at an institution of higher education ...
>
> (b) The amendment (in subsection (a)) is repealed December 31, 1993.
>
> (c) (1)The Equal Employment Opportunity Commission shall, not later than 12 months after the date of enactment of this Act, enter into an agreement with the National Academy of Sciences for the conduct of a study to analyze the potential consequences of the elimination of mandatory retirement on institutions of higher education.

...

(3) The results of the study shall be reported, with recommendations, to the President and to the Congress not later than 5 years after the date of enactment of this Act.

The reason for the special treatment of university teaching staff under the U.S. Act was to avoid:

- reductions in the hiring of younger faculty including minorities and women;
- difficulties for university budget planners in immediately adjusting to increased costs for older faculty choosing to remain past the normal retirement age; and
- difficulty with maintaining tenure arrangements.

The Ontario universities have argued in several different forums that there are special factors that apply in these institutions that support the maintenance of mandatory retirement at 65 for professors. Some of the arguments, which are not unlike those advanced in the United States, are set out in the judgment of Mr. Justice Gray in the *McKinney* case, in which the termination–at–65 policy survived a challenge under the equality rights section (Section 15) of the Charter of Rights.

Notwithstanding that trial decision there is some risk that the current Ontario universities retirement policy may be held, by an appellate court, to be subject to the Charter and to contravene its prohibition of age discrimination. Therefore, if there is to be a tenured faculty exception to any general mandatory retirement prohibition in the Ontario Human Rights Code, it would be wise to consider the merit of adding an express declaration to the Code to the effect that that exception is to operate notwithstanding Section 15 of the Charter. This would bring the exceptional rule for university faculty within the terms of a "legislative override" provided for in Section 33 of the Charter. In the result, the rule would not be subject to Charter challenge except on the automatic lapse of the override after 5 years, if not renewed by a further amendment. If the special rule were to be limited to that or a shorter time period the declaration would, of course, be definitive and would not need to be extended. The "twilight period" would afford the opportunity for further studies, as in the United States, to determine the significant dislocations that would result from the elimination of mandatory retirement in universities and to plan how to deal with them.

The Brief of the Council of Ontario Universities

The special concerns of Ontario universities have been expressed in a written submission sent to the task force by the Council of Ontario Universities. The following excerpts from its brief support the argument that universities should be exempted from a mandatory retirement ban.

> The presence of young, highly qualified faculty is an important source of new ideas and fresh energy; it fosters vitality and creativity. Therefore, universities need flexible appointment policies that encourage the hiring of young academics. At the same time, the need to protect the academic freedom of faculty and the desirability of providing a long–term stable environment, argue for policies that emphasize permanence in appointments. The system of tenure that has developed in our universities, while intended to serve both purposes, is principally designed as a protection of academic freedom. Under current tenure practice in Ontario universities, after an initial probationary appointment — usually four to six years, during which a faculty member is rigorously evaluated — successful probationers are granted a permanent (tenured) appointment. Once a faculty member is granted tenure, the appointment may be terminated prior to normal mandatory retirement only for cause or by reason of financial exigency or redundancy.
>
> The system of tenure, an esential protection of academic freedom, emphasizes stability. It clearly favours those academics with tenure over those without, those who hold appointments over those who are seeking appointments. Universities' needs for new, young faculty — the "new blood" which provides an important element in institutional vitality — are met by filling faculty positions that become vacant by reasons of attrition, including retirements, and on occasion by expansion of faculty complement. The abolition of the practice of mandatory retirement of faculty in Ontario universities will have a direct impact on university personnel policies as they affect the appointment of young academics and the system of tenure.
>
> If the abolition of mandatory retirement resulted in a substantial number of tenured faculty remaining past normal retirement age (65), as might be expected, appointment opportunities for young academics would be correspondingly reduced. Further, it would become necessary to review institutional procedures for the performance evaluation of tenured faculty to determine whether any changes were in order in the light of academics' longer career opportunities. In principle there is no incompatibility between the maintenance of the tenure system and an "age blind" system of performance evaluation. Moreover, contrary to common notions, tenured faculty continue to undergo evaluation. Nevertheless, in a different dispensation the present mechanisms for dealing with tenured

faculty, developed when mandatory retirement was the rule, would need to be re-examined in order to determine whether or not evaluation procedures should be strengthened and made more explicit or the system of tenure modified.

The Current Faculty Profile

As mentioned above, the normal way in which universities provide for the infusion of new, young faculty is by means of replacement. Positions left vacant by reason of resignation are most often filled by recently qualified academics. This is satisfactory when universities enjoy a normal faculty age profile, with faculty distributed more or less evenly throughout the various age categories and with a regular outflow at the age of normal retirement. Older, more highly paid faculty leave/retire; their places are filled with younger academics. Unfortunately, at the present time Ontario universities are experiencing an abnormal age distribution among their faculty, one that is having an adverse effect on their ability to hire young academics.

Currently the appointment of adequate numbers of new, young faculty is inhibited as a result of a series of historical circumstances. The great and rapid increase in university enrolment during the 1960s and early 70s required a large increase in faculty numbers, including many young, recently graduated academics. Since Ontario universities did not have the capacity at that time to offer doctoral programs across a broad range of academic disciplines, many of these appointees came from abroad. Moreover, few were women. This was followed by a period of constrained funding during which relatively few new faculty appointments were made. Overall faculty complements were largely frozen and most new appointments were made to fill the few positions made vacant as a result of retirement or resignation. As a result, the faculty age profile became badly skewed. Using data supplied by COU, the Bovey Commission (1985) estimated that if compulsory retirement were to be abolished by 1989 there would be some 300 fewer positions for new faculty available as replacements for retirees, 446 instead of 752 (*Bovey Report*, p. 22).

The profile of full-time faculty in Ontario universities in the academic year 1985-86 shows a large bulge in the age group 40-49, where more than 40 percent of the total were located. Only 2.4 percent of full-time faculty were less than 30 years of age and only 10.7 percent were less than 35. At the other extreme, 8.1 percent were 60 years of age or older and 19.1 percent were 55 or older.

Recently the situation has improved. The welcome addition of special Ontario government funding for faculty renewal is expected to provide for some 500 new faculty appointments over the coming five years and has improved prospects for the appointment of young academics, including women. However, this represents only 4 percent of the present total faculty complement. Increases in base operation grants will further improve the situation. Nevertheless, it will be a number of years before a more normal faculty age distribution is achieved and a normal pattern of new appointments develops.

Towards a More Flexible Retirement Policy

If the universities of Ontario are to improve their ability to manage their faculty complements they will need to develop more flexible faculty personnel policies. These should involve a package of options including early retirement, reduced load appointments, retraining provisions, and new appointment policies that emphasize the need to expand the number of young academics and to improve the balance between male and female faculty.

Universities are now moving to implement such policies. They should be encouraged to expand and to quicken their efforts. However, full development of these policies will take time and financial resources. Also, some experimentation would be desirable to allow development of the most suitable arrangements. As noted above, abolishing mandatory retirement will increase the burden on universities in their efforts to develop more flexible faculty appointments policies, at least in the short run. While it would not produce new problems, it would exacerbate existing ones.

Maintenance of a fixed mandatory retirement date for faculty does not preclude the expansion of policies involving early retirement, phased retirement or even post-retirement employment. Sound university faculty personnel policies should include all such options. As far as possible, however, it is preferable that the details of these policies should be worked out by negotiation at the institutional level rather than be imposed by law.

Conclusion

Given the unique mission of the university and its importance to contemporary Ontario society, it is recommended that, should current legislation permitting mandatory retirement at age 65 be amended and mandatory retirement by reason of age be abolished, university faculty be exempted from such legislation. Such an exemption would leave Ontario universities free to determine whether or not to maintain mandatory retirement of faculty or to negotiate modification or termination of such a policy.

Provision might be made that such an exemption would be reviewed after a period of five to seven years. The purpose of such a review would be to determine whether changes in the faculty age profile, in institutional policies and procedures on performance evaluation and tenure and on flexible retirement of faculty, and alterations in pension legislation and plans, had become such that continuation of the exemption was no longer warranted.

Mandatory Retirement and Existing Collective Agreements

A collective agreement may reflect a fixed retirement age agreed on between the employees' representatives and the employer. The agreement may set or confirm the age directly or it may simply make reference to a pension plan containing such an age as being part of the

employees' benefit package. In either case, it can be argued that the immediate introduction of a prohibition on mandatory retirement would unfairly upset the over–all labour–management bargain evidenced by the collective agreement by rendering one of its terms ineffective. This may, therefore, be another situation in which a transitional arrangement is appropriate.

In Quebec this concern was addressed on the occasion of the abolition of mandatory retirement, through a 1982 amendment to the provincial Labour Standards Act, by making the new regime inapplicable to employees covered by a collective agreement, and for whom there was a pension plan, until the expiry of that agreement.

The 1986 amendments to the U.S. Age Discrimination in Employment Act generally take effect on January 1, 1987 except in respect of any employee then subject to a collective agreement which contains provisions that would be superseded by the amending Act. In that situation the amendments are not to apply until the termination of the agreement or January 1, 1990, whichever occurs first.

If the Ontario Human Rights Code is to contain a transitional provision with respect to those covered by a collective agreement at the implementation date of any general prohibition of mandatory retirement, then, in order to protect against a Charter challenge to the delaying mechanism, the Code could incorporate an override of the Charter in that respect of the kind described above. In fact, there is a greater danger of a successful Charter challenge to a temporary exemption for those covered by a collective agreement than there is in respect of a similar exemption for university professors simply because the former would affect a larger, more diverse group of employees.

Judges and Masters

Provincial court judges and masters of the Supreme Court of Ontario retire on attaining age 65 except those appointed before the retirement age was reduced from 75 or 70, in which case the age in effect at the time of their appointment applies (for the text of the relevant provisions of the Courts of Justice Act see Schedule "A", Chapter 18 above). Bill 181, currently before the Ontario Legislature, would return the mandatory retirement age to 70 years.

The justices of the Supreme Court of Ontario are appointed by the federal government. Their retirement age is fixed at 75 years by Section 99(2) of the Canadian Constitution and could only be changed through the difficult process of constitutional amendment. Other federally appointed judges must retire, by statute, at 70 years of age except for Supreme Court of Canada judges for whom the retirement age is 75. While it may be hard to rationalize an older retirement age for the judges of the Supreme Court of Ontario than for provincial court judges, the difference could not be easily eliminated except by raising the retirement age for provincial court judges.

The principal argument for maintaining a fixed retirement age for judges, at some level or other, is that:

- aging is relevant to the office because it may be accompanied by a loss of intellectual ability, and
- if those no longer competent to sit on the bench had to be identified on an individual basis it could undermine judicial independence, through the threat of removal or an exercise of the power to remove on improper grounds.

The concern is probably as much about the possible perception that there is a potential for abuse as for the prospect that abuses will actually occur. The argument could easily be over–stated if one were to lose sight of the fact that difficult evaluations of the capabilities of a judge who is short of the current retirement age may now have to be made in the course of the investigation of complaints or removal proceedings under the Courts of Justice Act.

If judges are thought to constitute a special case and the statutory retirement age is to survive a general ban on mandatory retirement, then the Courts of Justice Act will have to be amended to the effect that the retirement rules that it contains shall operate notwithstanding the provisions of the Human Rights Code. Otherwise the ban of the Code would take precedence. It is unlikely that an age limit for judges could be justified as a B.F.O.Q. given the safety–related

emphasis that has been given to that exception and the need for establishing the inadequacy of individual assessments to come within the exception.

Mandatory Retirement as an Aspect of an Affirmative Action Program

It is conceivable that a limited mandatory retirement policy could be justified under the Human Rights Code if it were a feature of a "special program" to open employment opportunities for members of a disadvantaged group identified by one of the characteristics, other than age, mentioned as prohibited bases for discrimination in the Code. For example, mandatory retirement in a work force dominated, particularly at the senior level, by men might be an acceptable cost to an employer's program to improve the level of participation of women through a hiring policy giving preference to those of that sex.

The Code contemplates "special programs" in Section 13(1), which provides as follows:

> A right under Part I is not infringed by the implementation of a special program designed to relieve hardship or economic disadvantage or to assist disadvantaged persons or groups to achieve or attempt to achieve equal opportunity or that is likely to contribute to the infringement of rights under Part I.

This provision was probably designed to protect against claims of reverse discrimination as a result of an affirmative action program — for example a claim of sexual discrimination against men because of a hiring program giving preference to women. But the section is not limited in its terms to reverse discrimination situations. It could equally apply in the circumstances described above. However, the Human Rights Commission, which has discretion to approve a special program (but need not do so for it to have the over–riding effect prescribed by Section 13(1) of the Code), is likely to take a fairly sceptical view of a program that enhances the position of one disadvantaged group (women) at the expense of another (older persons).

15

Requisite Changes in Ontario Legislation and Government Regulations if the Human Rights Code were to Prohibit Mandatory Retirement

Introduction

There are a number of statutory provisions, set out in Schedule "A", that provide for mandatory retirement from public sector employment at a fixed age of, variously, 60, 65, 70 or 75 years. These include a section of the Public Service Act setting a retirement age of 65 that applies generally to provincial civil servants.

If mandatory retirement were prohibited under the Human Rights Code, these provisions would be of no further effect unless the relevant statutes were to be amended to state, in specific terms, that such provisions would continue to operate notwithstanding the Human Rights Code. Section 46(2) of the Code establishes the primacy of the Code in these terms:

> Where a provision in an Act or regulation purports to require or authorize conduct that is in contravention of (this Act), this Act applies and prevails unless the Act or regulation specifically provides that it is to apply notwithstanding this Act.

It would be in order, therefore, to repeal each of those statutory provisions mandating retirement at a fixed age, if that practice is to be prohibited under the Code, unless the provision relates to a particular type of occupation that:

- falls within an exception to the Code's prohibition of age discrimination, or
- otherwise justifies special treatment.

An example of the former might be the statutory requirement for regional police officers to retire at 60 years of age (see the sections of the Regional Municipality Acts referred to in Schedule "A"), which might be sustained as a *bona fide* occupational qualification under Section 23(1)(b) of the Code. An example of the latter might be the statutory requirement for provincial judges to retire at 65 or 70 (see the sections of the Courts of Justice Act) which might be justified on the basis that the alternative of individual evaluation of judges might threaten, or be seen to threaten, judicial independence. If the latter justification is made, the Courts of Justice Act would have to be amended to provide in specific terms that its mandatory retirement provisions are to override the protections of the Code.

The statutory provisions set out in Schedule "A" deal with employment situations although, in some cases, the positions that are subject to an age-related term of tenure are best described as "offices". One office that may or may not be a remunerative position is that of a director of a corporation. The Loan and Trust Corporations Act provides, in Section 56(3), that an individual is not qualified for appointment or election as a director of an Ontario incorporated loan or trust company if he has attained the age of 75 years. As a result no incumbent director of such a company may stand for re-election after reaching that age. While this may not constitute mandatory retirement in the conventional sense, this disqualification would also have to be reassessed if age discrimination were prohibited in the Human Rights Code without an upper age limit.

There are some Ontario regulations in the pension field, affecting municipal employees or employees of Crown corporations, that appear to authorize or require the employer, in certain circumstances, to terminate an employee because of his or her age (see the provisions of the regulations set out in Schedule "B"). In the event of a general prohibition on mandatory retirement in the Human Rights Code, these provisions would also have to be reviewed to determine if there is a real conflict with that prohibition and, if so, what amendments should be made.

By comparison, those requirements under pension or superannuation plans — many of which take statutory or regulatory form — that are tied to a "normal retirement age", specified

---

For further reference: Colin H.H. McNairn, *Life Without Mandatory Retirement: The Legal Regime*, a report commissioned by the Task Force.

for the purpose of making the appropriate actuarial calculations on which plan benefits are based, will not usually violate the prohibition on age discrimination in the Human Rights Code. This is because such requirements do not *compel* retirement at the selected age.

SCHEDULE "A": Legislation Providing for Mandatory Retirement

AUDIT ACT, R.S.O. 1980, c.35, s.4

The Audit Act provides for the office of the Provincial Auditor, which shall consist of the Auditor, the Assistant Auditor and such employees as may be required from time to time for the proper conduct of the business of the office.

The Auditor is an officer of the Legislative Assembly appointed by the Lieutenant Governor in Council on the address of the Assembly after consultation with the Chairman of the Standing Committee on Public Accounts.

The Auditor shall audit, on behalf of the Assembly and in such manner as the Auditor considers necessary, the accounts and records of the receipt and disbursement of public money forming part of the Consolidated Revenue Fund whether held in trust or otherwise.

Section 4 of the Audit Act provides as follows:

> The Auditor may hold office until the end of the month in which he attains the age of sixty-five years and may be reappointed for a period not exceeding one year at a time until the end of the month in which he attains seventy years of age, but is removable at any time for cause by the Lieutenant Governor in Council on the address of the Assembly.

CORONERS ACT, R.S.O. 1980, c.93, s.3(2)(a), (b)

The Coroners Act provides for the appointment by the Lieutenant Governor in Council of a Chief Coroner and one or more legally qualified medical practitioners to be coroners for Ontario. A coroner holds office during the pleasure of the Lieutenant Governor in Council.

A coroner shall be charged with the responsibility for the investigation of the circumstances of any death of a person other than by natural causes or of such deaths as he may deem appropriate.

Section 3(2) of the Coroners Act provides as follows:

> A coroner ceases to hold office,
>
> (a) on attaining the age of seventy years;
>
> (b) on the revocation, suspension or cancellation of his licence for the practice of medicine issued under the Health Disciplines Act.

COURTS OF JUSTICE ACT, S.O. 1984, c.11, ss.20(11); 54 (1)-(6)

The Courts of Justice Act provides for the appointment by the Lieutenant Governor in Council, on the recommendation of the Attorney General, of various judicial officers for the Province and specifies their powers and duties.

The Act provides for such provincial judges as are considered necessary, one of whom may be appointed Chief Judge of the Provincial Court. A provincial judge shall devote his or her whole time to the performance of his or her duties as a judge, except as authorized by the Lieutenant Governor in Council.

A provincial judge shall exercise the powers and perform the duties vested in him or her as a magistrate, provincial magistrate or one or more justices of the peace under Section 61 of the Act, sitting in the Provincial Court.

Section 54 of the Courts of Justice Act provides for the retirement of provincial judges and reads as follows:

> (1) Every provincial judge shall retire on attaining the age of sixty-five years.
>
> (2) Notwithstanding subsection (1), a provincial judge appointed as a full-time magistrate, judge of a juvenile and family court or master after the 1st day of July, 1941 and before the 2nd day of December, 1968 shall retire on attaining the age of seventy years.
>
> (3) Notwithstanding subsection (1), a provincial judge appointed as a full-time magistrate on or before the 1st day of July, 1941 shall retire on attaining the age of seventy-five years.
>
> (4) A judge who has attained the age for retirement under subsection (1) may, subject to the annual approval of the Chief Judge, continue in office as a full-time or part-time judge until he or she attains the age of seventy years, and a judge who has attained the age of seventy years may, subject to the annual approval of the Judicial

Council, continue in office as a full-time or part-time judge until he or she has attained the age of seventy-five years.

(5) An associate chief judge or senior judge who is in office on attaining the age for retirement under subsection (1) may, subject to the annual approval of the Chief Judge, continue in that office until he or she has attained the age of seventy years and an associate chief judge or senior judge who has attained the age of seventy years may, subject to the annual approval of the Judicial Council, continue in that office until he or she has attained the age of seventy-five years.

(6) A chief judge who is in office on attaining the age for retirement under subsection (1) or (2) may, subject to the annual approval of the Judicial Council, continue in that office until he or she has attained the age of seventy-five years.

The Act provides for such masters of the Supreme Court as are considered necessary, one of whom may be appointed Senior Master.

A master shall exercise the powers and perform the duties vested in him or her as master sitting in the Supreme Court.

Subsection 20(11) of the Courts of Justice Act makes the provisions of Section 54 applicable with necessary modifications to masters and the Senior Master. Therefore the retirement provisions therein apply with the necessary modifications to masters and the Senior Master.

During the last session of the Legislature a Bill (Bill 81) was introduced (first reading on December 17, 1986) to change the retirement age of provincial judges and masters to 70 years of age. This Bill died at the end of the session.

ELECTION ACT, R.S.O. 1980, c.133, s.4(8) and (9)

The Election Act establishes the machinery for provincial elections. The Act provides for the appointment by the Lieutenant Governor in Council of a Chief Election Officer, an Assistant Chief Election Officer, if need be, and a returning officer for every electoral district.

A returning officer who is appointed under this Act shall continue in office until he dies, or, with prior permission of the Chief Election Officer, he resigns, or unless he is removed from office under Sections 4(8) or (9) of the Election Act.

Section 4(8) and (9) of the Election Act provide as follows:

(8) The Lieutenant Governor in Council may remove from office any returning officer who,

(a) has attained the age of sixty-five years;

(b) is incapable, by reason of illness, physical or mental infirmity or otherwise, of satisfactorily performing his duties under this Act.

(9) The Chief Election Officer may remove from office any returning officer who has failed to discharge competently his duties, or any of them, under this Act.

OMBUDSMAN ACT, S.O. 1984, c.6, s.4(2)

The Ombudsman Act establishes the office of Ombudsman whose function it is to investigate any decision or recommendation made or any act done or omitted in the course of the administration of a governmental organization and affecting any person or body of persons in a personal capacity.

The Ombudsman is appointed by the Lieutenant Governor in Council on the address of the Legislative Assembly and is an officer of the latter body.

The Ombudsman holds office for a term of ten years, but is removable at any time for cause by the Lieutenant Governor in Council on the address of the Assembly.

Section 4(2) of the Ombudsman Act provides as follows:

(2) The Ombudsman shall retire on attaining the age of sixty-five years but, where he attains the age of sixty-five years before he has served five years in office, he shall retire on serving five years in office.

PUBLIC SERVICE ACT, R.S.O. 1980, c.418

The Public Service Act establishes the machinery for the provincial public service. The vast majority of Crown employees comprising the public and civil service are appointed and regulated by the provisions of this Act and its regulations.

A Crown employee is any person employed in the service of the Crown or any agency of the Crown, but does not include an employee of Ontario Hydro or the Ontario Northland Transportation Commission.

More particularly, a civil servant is any person appointed to the service of the Crown by the Lieutenant Governor in Council on the

certificate of the Civil Service Commission or by that Commission.

Section 17 of the Public Service Act reads as follows:

> Every civil servant shall retire at the end of the month in which he attains the age of sixty-five years, but, where in the opinion of the Commission special circumstances exist and where his deputy minister so requires in writing, he may be reappointed by the Lieutenant Governor in Council for a period not exceeding one year at a time until the end of the month in which he attains the age of seventy years.

The Regulation (Ont. Reg. 881, R.R.O. 1980) under the Public Service Act provides, in sections 87–89, for certain termination payments to an employee on the occasion, *inter alia*, of retirement under Section 17 of the Public Service Act.

Regional Municipality Acts

The following Regional Municipality Acts must be reviewed:

REGIONAL MUNICIPALITY OF DURHAM ACT,

R.S.O. 1980, c.434, ss.76(3)(b) and 76(5)

REGIONAL MUNICIPALITY OF HALDIMAND–NORFOLK ACT,

R.S.O. 1980, c.435, ss.71(3)(b) and 71(5)

REGIONAL MUNICIPALITY OF HALTON ACT,

R.S.O. 1980, c.436, ss.82(3)(b) and 82(5)

REGIONAL MUNICIPALITY OF HAMILTON–WENTWORTH ACT,

R.S.O. 1980, c.437, ss.93(3)(b), 93(5) and 93(6)

REGIONAL MUNICIPALITY OF NIAGARA ACT,

R.S.O. 1980, c.438, ss.120(3)(b) and 120(4)

REGIONAL MUNICIPALITY OF PEEL ACT,

R.S.O. 1980, c.440, ss.77(3)(b) and 77(5)

REGIONAL MUNICIPALITY OF SUDBURY ACT,

R.S.O. 1980, c.441, ss.41(4)(b) and 41(5)

REGIONAL MUNICIPALITY OF WATERLOO ACT,

R.S.O. 1980, c.442, ss.112(3)(b) and 112(4)

REGIONAL MUNICIPALITY OF YORK ACT,

R.S.O. 1980, c.443, ss.114(3)(b) and 114(4)

These Acts provide for, *inter alia*, the establishment of the various regional police forces each consisting of every person who was a member of a police force of a regional municipality within the appropriate regional area on a specified date and who continued to be a member until a second specified date, and of every member newly appointed by the appropriate regional policy board.

The sections of the Durham Act, the Halton Act, the Niagara Act, the Peel Act, the Sudbury Act and the Waterloo Act noted above are identical in wording except for their particular references to the Regional Police Force of the subject municipality. The standard provision reads as follows:

> Every person who becomes a member of the ... Regional Police Force ... shall,
>
> with the exception of civilian employees and assistants, be retired on the last day of the month in which the member attains the age of sixty years;
>
> Civilian employees and assistants of the ... Regional Police Force shall be retired on the last day of the month in which such civilian employee or assistant attains the age of sixty-five years.

The sections of the Hamilton–Wentworth Act noted above are in the same terms but include an additional transitional provision (Section 93(6)) to the following effect:

> Notwithstanding the (provision requiring retirement at sixty years of age), those members of the police force of a local municipality whose retirement age under By-law No. 7970 of the City of Hamilton was sixty-five years of age immediately before they became members of the Hamilton-Wentworth Regional Police Force shall retire on attaining thirty-five years of service or sixty years of age, at the option of the member, and for the purpose of bargaining for benefits in the retirement plan

established by the said By-law No. 7970 with the bargaining committee ..., the Hamilton-Wentworth Police Board shall stand in the place and stead of The Corporation of the City of Hamilton and the provisions of the Police Act apply, with necessary modifications, thereto.

The sections of the Haldimand-Norfolk Act and the York Act noted above also include a transitional provision, affording an exception from the rule requiring retirement at age 60, until a fixed date, for those who were members of a police force of a local municipality, now comprising part of the region, who were subject to retirement at age 65, in which event that retirement age continues to apply to those individuals in the transitional period.

The retirement of the members of other local police forces in Ontario is governed by the employment practices established by the respective boards of commissioners of police established under the Police Act, R.S.O. 1980, c. 381, rather than by legislation. The retirement of members of the Ontario Provincial Police is governed by the Public Service Act, R.S.O. 1980, c.418.

SCHEDULE "B": Regulations Providing for Mandatory Retirement

ONTARIO REGULATION 678, R.R.O. 1980, s.12(a), (adopted pursuant to the MUNICIPAL ACT, R.S.O. 1980, c.302)

The regulation applies to by-laws that provide for pensions for employees that were passed by municipalities or local boards under a predecessor of Section 208, para. 46 of the Municipal Act and were approved by the Department of Municipal Affairs before April 18, 1962.

Section 12(a) of the regulation provides as follows:

> Where a pension plan provides that an employee may remain in the service of the municipality or local board after attaining normal retirement age, the pension plan shall provide that,
>
> (a) the employee's service shall be for a period of one year renewable by the municipality or local board for further periods of one year each;

ONTARIO REGULATION 796, R.R.O., 1980 s. 6(1), (adopted pursuant to the POWER CORPORATION ACT, R.S.O. 1980,c. 384)

The Regulation provides for pensions for employees of Ontario Hydro (the "Corporation").

Section 6(1) of the Regulation provides as follows:

> Where a member has completed fifteen years of continuous employment and is within ten years of the member's normal retirement date the Corporation may retire the member on a pension, or the member, with the consent of the Corporation, may retire on a pension.

ONTARIO REGULATION 952, R.R.O. 1980, s.6, (adopted pursuant to the WORKER'S COMPENSATION ACT, R.S.O. 1980, c.539)

This Regulation establishes a pension plan for employees of the Workers' Compensation Board.

Section 6 of the Regulation provides as follows:

> (1) Under special circumstances, the Board may permit a member to defer his retirement for a specified period not in excess of one year and such deferment may be renewed, but in no case shall a member's retirement be deferred beyond his attaining age seventy.
>
> (2) Notwithstanding subsection (1), a commissioner may remain in office during pleasure.
>
> (3) A member whose retirement is deferred shall continue to be a contributor during the period of deferment.

Ontario Regulation 286, R.R.O. 1980, s.2, (adopted pursuant to the EMPLOYMENT STANDARDS ACT, R.S.O. 1980)

Under Section 40 of the *Employment Standards Act*, an employer is obliged to provide a minimum amount of notice to an employee of his or her termination if it is other than for wilful misconduct or wilful neglect of duty. The prescribed notice varies between one week and eight weeks depending on the employee's length of service. In practice, the statutory notice obligation may be satisfied by a payment to the employee, in lieu of notice, reflecting the amount of wages, salary and benefits that would

have accrued in favour of the employee during the notice period.

Section 2 (g) of the Regulation under the *Employment Standards Act* provides that Section 40 of the Act shall not apply to a person who:

> Having reached the age of retirement according to the established practice of the employer, has his employment terminated.

This exception should be eliminated if mandatory retirement is to be prohibited by the Human Rights Code so that the Employment Standards Act and the Human Rights Code are not inconsistent.

16

The Funding and Design Consequences for Pension Plans

Introduction

If certain pension regulations are changed appropriately, then a mandatory retirement ban will not impose undue problems in the funding and design of pension plans. Appropriate changes in pension plans will focus on the treatment of people who choose to retire later than the normal retirement date. Jurisdictions that have banned mandatory retirement have imposed a variety of requirements in this regard.

It is important to note that a desire by management to encourage retirement at a prescribed age or earlier may result in pension plan improvements. This desire may also result in a management attempt to reduce pension benefits for post–65 workers below the actuarial fair amounts. Government regulations to restrict the latter may be considered desirable. Otherwise retirement may be mandated by unfair financial incentives rather than mandated by law.

Postponed Retirement Provisions

The majority of pension plan members in Ontario are in plans which contain a postponed retirement provision. In 1984, 74.3 percent of members of earnings–based plans and 74.4 percent of members of flat benefit plans were subject to a postponed retirement provision. (This does *not* imply that these plan members can opt for postponed retirement, since the employer's consent is often required if the member is to defer retirement beyond the normal retirement age.)

There are four main provisions for the treatment of pension benefits after the member has attained the normal retirement age. These are: (1) the continued accrual of pension benefits, with no actuarial increase of previously accrued benefits; (2) the actuarial increase of previously accrued benefits, but no further accrual of new pension benefits; (3) no actuarial increase *and* no further accrual of pension benefits; and (4) the continued accrual of pension benefits *and* the actuarial increase of previously accrued benefits.

In the case of continued accrual, the member continues to earn additional pension benefits, up to the ceiling established by the plan. In the case of actuarial adjustment, the previously accrued pension benefits are increased to reflect two factors: (1) the postponement of their receipt (and thus the earning of additional investment income on the accumulated savings) and (2) the reduced life expectancy of the member after the pension payments have commenced. The actuarial increases in the value of the pension payments are quite large, even if retirement is delayed for only a few years.

At an interest rate of 5 percent, for example, the promised pension rises by about 17 percent if the member postpones retirement to age 67, and by about 27 percent if the member postpones retirement to age 68. At an interest rate of 9 percent, the pension rises by about 25 percent if retirement is at age 67, and by almost 40 percent if retirement is at age 68. In spite of these sharp increases in the size of the postponed pensions, the cost to the plan sponsor is — by construction — no greater than if the plan member had retired at age 65.

Since Revenue Canada requires that pensions become payable prior to age 71, the postponed retirement provisions can differentially affect plan members only between the ages of 66 and 70, inclusive. In earnings–based plans, which are the focus of the illustrations, the operation of certain of the provisions is quite sensitive to the economic climate. The operation of these provisions is thus illustrated for non–inflationary, moderate inflation and high inflation environments. The results are also shown for an early entrant (age 30) and a late entrant (age 45) to the plan, since the member's years of service and thus the size of the pension benefit earned at age 65 prove to be important. To the extent that females now approaching normal retirement age are likely to have less years of pensionable service than their male counterparts,

For further reference: James E. Pesando, *Employer–Sponsored Pension Plans and Mandatory Retirement*, a report commissioned by the Task Force.

the observed differences for the early and the late entrant may serve as a rough proxy for male and female differences.

The continued accrual of benefits with the actuarial increase of previously accrued benefits is, in general, the most generous provision. In the moderate inflation and high inflation environments, pension compensation remains positive through age 70, for both the early and the late entrant. The pension benefit earned, expressed as a fraction of the member's wage, is higher when the inflation rate is high. This is due to the fact that the large wage increases which occur when inflation is high serve to raise, through the final earnings formula, the value of previously accrued benefits. Because the early entrant has a greater number of years of service, the magnifying impact of these large wage increases is greater, and the additional pension compensation earned by the early entrant thus exceeds that earned by the late entrant.

No further accrual of pension benefits together with the actuarial increase of previously accrued benefits yields pension compensation that is equal to zero between the ages of 66 and 70. Neither the pension compensation earned by the plan member nor the pension cost incurred by the sponsor is affected by the choice of the postponed retirement age.

When there is **no further accrual and no actuarial increase**, the pension benefits earned by both the early and late entrant are large and negative in all environments. By opting for postponed retirement, the plan member forgoes the receipt of pension payments, and receives nothing in return. Because the early entrant has a larger number of years of service and thus a larger pension entitlement at normal retirement age, the early entrant suffers the largest drop in pension compensation. Clearly, there is a strong disincentive to continued work for plan members subject to this provision. For the early entrant, pension compensation is *negative* and equal to more than 40 percent of salary at age 66; for the late entrant, pension compensation is *negative* and exceeds 20 percent of salary. These figures are even more dramatic when contrasted with the large and positive pension compensation that the plan member will earn in the year that he or she attains age 65. If the plan has no special retirement provision (i.e., if age 65 is the earliest age at which the member can qualify for an unreduced pension) and actuarial reduced early retirement, pension compensation in this 65th year can exceed 40 percent of salary for the early entrant, and 25 percent of salary for the late entrant.

The provision that **pension benefits continue to accrue, but that previously accrued benefits are not actuarially increased,** is the most complicated. In the examples considered, the early entrant earns negative pension compensation between the ages of 66 and 70. The late entrant, who forgoes the receipt of a smaller benefit, earns pension compensation that hovers around zero. The member who opts for postponed retirement fares better, the higher is the inflation rate. As before, this is due to the fact that wage increases are high when the inflation rate is high, and these wage increases enrich — through the benefit formula — all previously accrued pension benefits.

One should note, however, that if the rate of growth of wages is higher than the interest rate, pension compensation may remain positive between the ages of 66 and 70. It is unlikely that wage increases will exceed the interest rate for a sustained period of time. Nonetheless, it is possible that an individual employee (or even a group of employees) may, in certain circumstances, anticipate large wage increases in the years immediately following a decision to postpone retirement.

In general, however, the continued accrual of benefits is not likely to be sufficient to eliminate the disincentive to postponed retirement that exists if previously accrued benefits are not actuarially increased. This is especially likely for the long–service employee who has accrued a large pension benefit through the normal retirement age of 65. A similar result will hold for flat benefit plans, unless the enrichments negotiated to the benefit formula during the plan member's postponed retirement years are sufficiently large to offset the forgone pension payments.

Postponed Retirement Provisions from the Perspective of the Plan Member and Sponsor

In order of *increasing* generosity (and thus of *increasing* cost), the postponed retirement provisions can be ranked as follows:

(1) no actuarial adjustment, no further accrual;

(2) no actuarial adjustment, continued accrual;

(3) actuarial adjustment, no further accrual; and

(4) actuarial adjustment, continued accrual.

As noted, if the plan member aged 66 to 70 receives wage increases that are large, it is possible that alternative (2) might be more generous than alternative (3). On average, however, one would expect that wage increases (or retroactive enrichments to flat benefit plans) would not be sufficient to reverse the ranking indicated above.

From the perspective of the *plan member*, alternative (1) represents a disincentive to continued work, since the member — by electing to work beyond age 65 — forfeits pension payments each year that retirement is postponed. A worker previously subject to mandatory retirement would, if mandatory retirement were banned, be less likely to opt for postponed retirement if alternative (1) were in effect. Alternative (2), the continued accrual of pension benefits after the normal retirement age, will be preferred by the plan member. Nonetheless, it is likely — especially for the long–service worker —that pension compensation will still be negative. It is not clear how well this point is understood by plan members as well as by legislators. Alternative (3), in effect, sets pension compensation equal to zero after the date of normal retirement. Neither a work incentive nor a work disincentive is created. Alternative (4) provides a positive work incentive. It is also the least prevalent of the four alternatives.

From the perspective of the *plan sponsor*, alternative (1) is the least costly. Indeed, if a member opts to defer retirement and is subject to this provision, the employer's pension costs will fall. This may be seen by the employer as an offset to the increase in the cost of providing other fringe benefits (sickness and short–term disability benefits, group life insurance, medical/dental/hospital plans) to older workers. Alternative (2) is, in some sense, the most flexible from the perspective of the employer. If the worker is highly valued and receives large wage increases, the worker's pension compensation will remain positive. For a more moderate set of wage increases, pension compensation will be negative, and will thus represent a source of cost saving. Alternative (3) provides no source of cost saving if the worker opts for postponed retirement, and may be viewed by the employer as unattractive on this account. Alternative (4) is the most costly and thus the least attractive from the perspective of the plan sponsor.

There remains the question of who ultimately bears the incidence of any increase in pension costs, the employer or the employee. Economic analysis suggests that, *in the long run*, it will be the *employee* who ultimately bears the increase (or the reduction) in pension costs, although this is not likely to be the case in the short run. Suppose, for simplicity, that the productivity of the employee over the course of his or her attachment to the firm is unchanged. Under competitive market conditions, the lifetime compensation of the employee would also be unchanged. If there is an increase in the cost of the employee's pension benefits, then the employee's cash wage and/or other fringe benefits will be reduced accordingly. Although simple, the above illustration captures the essence of the economic forces that would come into play over the long run. In the short run, however, employers are not likely to have the flexibility to make the necessary adjustments elsewhere in the compensation package. Employer costs will rise if pension costs rise, and employer resistance to legislative changes which increase pension costs can be anticipated on this account.

Legislative Initiatives in Other Jurisdictions

Quebec and Manitoba, as well as the Government of Canada, have passed a legislative ban on mandatory retirement. Each of these jurisdictions has introduced parallel legislation designed to weaken or to eliminate any work

disincentives contained in the plan's postponed retirement provisions. Loosely, Quebec requires that the pension benefits of those who opt for postponed retirement be actuarially increased, while Manitoba and the Federal government require the continued accrual of pension benefits. All jurisdictions have thus eliminated the alternative of no actuarial adjustment and no further accrual. If the Ontario government is to eliminate mandatory retirement, experience in other jurisdictions would suggest the appropriateness of a parallel proposal to require either the continued accrual of pension benefits, to the maximum benefit allowed by the plan, or the actuarial adjustment of previously accrued benefits. Each of these points is elaborated below.

Quebec

Quebec Bill 15 requires that the benefits of those who elect postponed retirement be actuarially increased. If a member elects postponed retirement and contributes "required" contributions, then the increase in the member's pension benefit must at least equal the pension that could be purchased by these additional contributions. The employer is under no obligation to make contributions after the employee has reached the normal retirement age. The basic principle under the Quebec legislation is that there should be neither gain nor a loss to the pension plan as a consequence of the employee's decision to opt for postponed retirement.

Manitoba

In Manitoba, if the plan is non–contributory or if a member of a contributory plan elects to continue to make required contributions, then benefits continue to accrue but no actuarial increase in benefits is required. If a member of a contributory plan elects not to make contributions, then no further accrual takes place, but the pension must be actuarially increased. Stated differently, pension benefits continue to accrue in the event of postponed retirement, *except* in the case of a contributory plan when the member elects to cease making required contributions. Results discussed earlier in this chapter suggest that a member of a contributory plan is likely to be better off by electing *not* to make required contributions, thus qualifying for the actuarial adjustment, unless particularly large wage increases during the postponed retirement years are anticipated.

Government of Canada

In its recently enacted *Pension Benefits Standards Act, 1985* (passed June 26, 1986), the Government of Canada introduced the requirement in plans subject to its jurisdiction that a member who opts for postponed retirement be allowed to continue to accrue pension benefits. This continued accrual is subject to any term in the pension plan which fixes a maximum number of years of pensionable service or fixes the maximum amount of the pension benefit.

This provision is similar to one recently enacted by the U.S. Government, in amendments to the Age Discrimination in Employment Act of 1967. This amendment makes illegal any provision in a pension plan which requires or permits the cessation of (or reduction in) a member's benefit accruals because of age. It is perfectly legal, however, for a pension plan to provide for a maximum pension or for a maximum number of pensionable years of service, so long as these are not triggered by the fact that the member has attained a particular age.

Ontario

Bill 170, *An Act to Revise the Pension Benefits Act,* received Royal Assent on June 29, 1987. The Act, in its final form, provides that an employee whose retirement is postponed has the right to continue to accrue pension benefits, subject to any term in the pension plan which fixes a maximum number of years of pensionable service or fixes the maximum amount of the pension benefit. Bill 170 thus parallels the Federal legislation in this regard.

The "Compatibility" of a Ban on Mandatory Retirement with a Normal Retirement Age

Normal retirement age is the earliest age at which members may retire on the basis of age as a right, and commence receiving full pension benefits without reduction. Normal retirement age in private sector pension plans is quite

concentrated at age 65. In 1984, 95.5 percent of members of earnings–based plans in Ontario were subjected to a normal retirement age of 65, as were 95.2 percent of members in flat benefit plans. In both the non–union and the union sectors, the typical age of normal retirement is thus age 65.

It is important to emphasize that there is no inherent conflict between a ban on mandatory retirement and the establishment, for planning and costing purposes, of a normal retirement age. The Quebec legislation provides that the normal retirement age be set by the pension plan, and requires only that this age not exceed 70 years. In Manitoba, the pension plan is free to set the normal retirement age. Further, the setting of the normal retirement age does not constitute discrimination because of age within the meaning of Manitoba's *Human Rights Act*. The Federal legislation allows the plan to set its own "pensionable age," which is equivalent to its own normal retirement age, without restriction. Ontario's proposed legislation (Section 36.(2), (3)) provides, for plans submitted for registration after 31 December 1986, that the normal retirement date be no later than one year after the attainment of age 65. For existing plans, for benefits that accrue after 31 December 1986, the normal retirement date shall be deemed to be no later than one year after the attainment of age 65, unless the plan specifies an earlier normal retirement date.

Conclusions

The substantive points made above can be summarized as follows:

(1) There are four main provisions for postponed retirement, and these provisions produce sharply different work incentives for those employees who are contemplating postponed retirement.

(2) Of the three most prevalent provisions, the least attractive from the perspective of the plan member occurs when pension benefits cease to accrue and previously accrued benefits are not actuarially increased. In this case, plan members who opt for postponed retirement forgo the receipt of pension payments and receive nothing in return. Plan sponsors will experience a *decline* in pension costs, which might offset the higher cost of other fringe benefits and/or salary relative to the alternative of replacing the older plan member with a younger employee.

(3) Those jurisdictions which have banned mandatory retirement have all outlawed the postponed retirement provision noted above.

(4) In its revised form, Bill 170 (*An Act to Revise the Pension Benefits)* has also banned this provision.

(5) If the Ontario government chooses, regardless of its stand on mandatory retirement, to recommend that the provision be banned, there are two main alternatives: (i) the actuarial adjustment of previously accrued benefits, and (ii) the continued accrual of pension benefits. Option (ii) will still produce negative pension compensation (and thus employer's pension costs will fall), unless the employer awards especially large wage increases to those who opt for postponed retirement. Employers will undoubtedly value this flexibility. Option (i) will, in general, prove to be more generous to employees. If the employee elects to work part–time after attaining age 65, it would be straightforward under option (i) to allow him or her to begin to draw immediately the desired fraction of the accumulated pension, so as to "top up" earnings from continued employment to the desired level. This option is provided to the employee by Bill 15 in Quebec, but only to the extent necessary to offset a decline in wages or in salary that would otherwise occur.

(6) The decision by the Ontario government to ban mandatory retirement will not interfere with the employer's designating, for planning and costing purposes, a normal retirement age under the plan. Ontario's Bill 170 has set a maximum normal retirement age of no later than one year after the attainment of age 65, and a ban on mandatory retirement would require no change in this provision.

(7) The Government of Canada announced in October 1986 that the tax–free transfer of pension income to RRSP's will be phased out by 1994. As a result, tax considerations will make the actuarial adjustment of previously accrued benefits a preferred alternative to the commencement of full pension benefits when the employee reaches the normal retirement age set by the plan.

(8) The Province of Ontario has established a Task Force on Mandatory Inflation

Protection; its mandate is to establish the most appropriate formula and phase–in procedures for inflation protection. If the Task Force recommends inflation protection that is a significant improvement over present ad hoc arrangements, and if the initiative has an important element of retroactivity, then older workers will have a *reduced* incentive to postpone retirement if they are concerned about the potential erosion by inflation of the real value of their pension income. This concern receives less attention in today's environment of modest inflation. Yet an important argument used in the late 1970's by those who advocated a ban on mandatory retirement was that the inflation protection accorded private pension income was inadequate.

(9) Depending on the formula selected and the degree of retroactivity, mandatory inflation protection will increase pension costs, and at least part of this cost increase is likely to be borne initially by employers. To the extent that enriched early or special retirement provisions, or individual "buy–outs", are used by employers to induce retirement in the event of a ban on mandatory retirement, employers' costs will increase on this account. This may serve as an argument for the gradual rather than the abrupt phase–out of mandatory retirement.

(10) Bill 170 involves substantial changes to the design and costing of pension plans in Ontario. Certain provisions, such as those dealing with the equitable treatment of males and females and singles and married, are complicated and difficult to implement. The introduction of, or changes in, postponed retirement provisions subsequent to a ban on mandatory retirement, including a phased–in ban, should *not* pose a difficult set of problems for plan sponsors. Thus pension design considerations should *not* be assigned a major weight in assessing the question of whether or not to ban mandatory retirement.

The Cost Consequences for Pension Plans

A ban on mandatory retirement will *not* require plan sponsors to designate a new normal retirement age. Bill 170 has set a maximum normal retirement age of no later than one year after the attainment of age 65, and a ban on mandatory retirement would require no change in this provision.

A ban on mandatory retirement would require that the plan sponsor include an explicit postponed retirement provision in the plan. In 1984, 229 of the 1,953 earnings–based plans in the private sector, under the jurisdiction of the Province of Ontario, contained no postponed retirement provision. Of 481 flat benefit plans, 152 contained no postponed retirement provision. In terms of plan member, 25.7 percent in earnings–based plans and 25.6 percent in flat benefit plans were not subject to a postponed retirement provision. For these plans, a ban on mandatory retirement will require a design change, in the form of the insertion of a postponed retirement provision. A further design change will be required if one of the existing postponed retirement provisions is banned.

If a plan sponsor introduces a postponed retirement provision subsequent to a ban on mandatory retirement, then the cost of the plan may rise, fall or remain unchanged, depending on the provision. If the number of employees who opt for postponed retirement is small, the change in the cost of the plan — as measured by the contribution rate for current service — will be small. As a consequence, there is likely to be no major change in funding requirements linked to the introduction or alteration of a postponed retirement provision.

If mandatory retirement is banned, plan sponsors may seek to enhance the role of subsidized early retirement provisions, and perhaps introduce or liberalize special retirement provisions, in order to entice employees to retire before the normal retirement age. In effect, employers may try to pre–empt the potential difficulties —including the possibility of unjust dismissal lawsuits — that might arise if mandatory retirement can no longer be used as a dismissal rule. If employers respond in this manner, there will be *indirect* design consequences for pension plans of a ban on mandatory retirement. (Employers may, as an alternative or in addition, negotiate individual "buy–outs," especially during the adjustment period subsequent to a ban on mandatory retirement.)

The impact on plan costs of enriching early or special retirement provisions will depend on the fraction of the work force who elect to exercise

this option. This fraction, in turn, may be difficult to predict. For this reason, the cost exercises incorporate a range of assumptions about the fraction of employees who opt to retire early when provided with the opportunity.

Finally, to provide additional perspective, the cost of introducing partial inflation protection (60 percent) of the CPI into occupational pension plans is assessed. This exercise is motivated by the mandate of the Ontario Task Force on Inflation Protection. In the present context, there are two relevant questions. First, is any cost increase as a result of changes to early, special or postponed retirement provisions likely to be large relative to the cost increase associated with mandatory inflation protection? Second, how are the cost implications of changes to early, special or postponed retirement provisions altered if mandatory inflation protection is *also* introduced?

A Representative Final Earnings Plan

In order to assess the cost impact of changing or introducing plan provisions, one must specify the details of the plan, as well as the nature of the economic environment. Of particular importance in the present context, one must also specify the termination and retirement rates for the plan membership. In so doing, one must consider the retirement incentives contained in the relevant plan provisions.

The representative final earnings plan which serves as the "base case" in the cost estimates has the following provisions. The plan is integrated with the Canada Pension Plan (CPP), as is usually the case. The plan member earns a benefit for each year of service equal to 1.4 percent of final average earnings (last 3 years) on earnings up to the Year's Maximum Pensionable Earnings (YMPE), and 2 percent of final average earnings in excess of the YMPE. The private pension benefit is thus higher on earnings in excess of the ceiling established by the CPP, and lower on earnings beneath the ceiling. The annuities due under the terms of the plan are nominal (i.e., there is no inflation protection). Vesting, or the time at which the employee becomes legally entitled to a benefit under the terms of the plan, occurs after two years of service, in line with the new legislative requirement throughout Canada. The plan is contributory, and the pre–retirement death benefit is a refund of the member's own contributions plus interest. In the base case, there is early retirement at age 55 and 10 years of service, but on an actuarial reduced basis. Subsequently, the analysis will focus on the cost implications of making early retirement available on a subsidized basis, and of introducing special retirement. There is no postponed retirement provision in the basic plan, which provides for mandatory retirement at age 65.

The real interest rate is set equal to 3 percent, while the rate of growth of real wages (before the imposition of the age–specific merit pay scale) is 1.5 percent. The age–specific merit scale assumes that the worker receives an annual merit increase of 1.65 percent between age 30 and 52, and *minus* 0.8 percent between age 53 and 65, as well as thereafter. Of particular importance is the rate of inflation, which determines both the nominal interest rate and the rate of growth of nominal wages. The inflation rate is set equal to 5 percent. This is slightly in excess of the present inflation rate of 4 percent, and is in rough accordance with the "consensus" projection of the long–run inflation rate in Canada.

Termination and retirement rates play an important role in the cost analysis. The termination rates are those used by the Task Force on Retirement Income Policy, in Volume II of its *Report*. The cost of the plan is established using the "entry age normal" method, with entry age set equal to 30. The termination rates decline continuously, from 9.76 percent at age 30 to about 0.5 percent at age 55. Starting at age 55, members are able to retire and to receive an immediate benefit. The retirement rates assumed in our base case are also those used by the Task Force on Retirement Income Policy. At age 55, the retirement rate equals one percent; at age 60, 9 percent; at age 64, 14 percent. Age 65, the retirement rate equals 100 percent, due to the presence of the mandatory retirement provision.

If subsidized early or special retirement is introduced into the plan, its purpose — from the viewpoint of the employer — is to encourage or to facilitate retirement before the normal retirement age of 65. Subsidized early and special retirement provisions create incentives for

members to work at least until qualifying for the benefit. In addition, members may have an incentive to quit *after* qualifying for special retirement, if pension benefit accruals subsequently turn negative. These incentives should, of course, be reflected in the assumed retirement rates. Unfortunately, there is no precise method for estimating the impact on retirement rates of introducing subsidized early or special retirement. In principle, termination rates should decline in advance of the age at which the member becomes eligible for subsidized early retirement, and the retirement rate should rise — perhaps sharply — at this age. The retirement rate should also rise — perhaps sharply — at the age of eligibility for special retirement.

If mandatory retirement is removed, one must drop the assumption that the retirement rate equals 100 percent at age 65. In the base case, without mandatory retirement, this retirement rate is set equal to 90 percent. Thus 10 percent of employees still active at age 65 are assumed to opt for postponed retirement. This fraction is probably high. Nonetheless, it is preferable to err on the side of overestimating this fraction if one wishes, in effect, to place an upper bound on the cost impact of introducing a postponed retirement provision. For those members age 66 to 68, the retirement rate is 40 percent; for those aged 69, 45 percent; and for those aged 70, 100 percent.

Postponed Retirement Provisions: Cost Implications

The "entry–age–normal" contribution rate is the measure of pension cost throughout the analysis. This is the long–run contribution rate, expressed as a fraction of the employee's earnings, which is required to fund the indicated benefit over the course of the employee's expected work life.

Consider first the contribution rates required for the basic plan, when it is extended to include a postponed retirement provision. Perhaps the most useful exercise is to focus on the change in the contribution rate when the least expensive postponed retirement provision (no actuarial adjustment, no further accrual) is replaced by the most expensive provision (actuarial adjustment and continued accrual). If a high percentage (10 percent) of employees aged 65 opt to postpone retirement, and if the plan provides no inflation protection, the contribution rate rises from 9.13 percent to 9.27 percent of earnings. If the pension plan provides inflation protection equal to 60 percent of the inflation rate, the rise in the contribution rate is slightly larger, from 10.90 percent to 11.08 percent of earnings. If the plan provides for subsidized early retirement and special retirement at "62 and 20", the rise in the contribution rate is somewhat smaller. The rise in the contribution rate is from 10.13 to 10.23 percent of earnings when there is no inflation protection, and from 12.25 to 12.37 percent when the plan provides inflation protection. This attenuated increase in the contribution rate, when the least expensive postponed retirement provision is replaced by the most expensive one, is due to the fact that more employees retire before the normal retirement age when there is subsidized early and special retirement. As a consequence, there are fewer employees aged 65, and therefore fewer employees who opt for postponed retirement.

If only 3.5 percent of employees aged 65 opt to postpone retirement, the rise in the contribution rate when the least expensive postponed retirement provision is replaced by the most expensive also decreases in size. For the basic plan without inflation protection, the rise is from 9.19 to 9.24 percent of earnings, or an increase of 0.05 percentage points, compared to an increase of 0.14 percentage points if 10 percent of employees aged 65 opt to postpone retirement. This result, of course, reflects the fact that there are fewer employees opting for postponed retirement, so that the difference in costs across provisions is reduced.

The assumption that 10 percent of employees aged 65 would elect to postpone retirement would appear, on average, to be too high. Nonetheless, there may be *some* establishments for which this is a reasonable approximation. In general, the likelihood that postponed retirement *experience* will vary across establishments, producing corresponding variation in plan costs, should be acknowledged.

If there is no postponed retirement provision, the contribution rate for the basic plan is 9.19 percent if there is no inflation protection, and 10.98 percent if there is inflation protection. If the sponsor introduces a postponed retirement

provision, which provides neither for actuarial adjustment nor continued accrual, the contribution rate falls, to 9.13 and to 10.90 respectively. A similar result occurs when the basic plan is expanded to include subsidized early and special retirement. This reduction in plan costs reflects the fact that an employee who opts for postponed retirement forgoes the receipt of pension income, and receives no further enrichment to the pension benefit. If the postponed retirement provision calls for actuarial adjustment but no further accrual, the contribution rate is essentially the same as the case in which no postponed retirement provision exists.

Those jurisdictions in Canada which have banned mandatory retirement have also ruled that plans cannot provide for no actuarial adjustment and no further accrual after the employee has reached the normal retirement age. The continued accrual of benefits, with no actuarial adjustment, is likely to be the second least expensive of the postponed retirement provisions. For this reason, it is useful to note the rise in the contribution rate which occurs if the least expensive option is replaced by the next least expensive one. As before, an upper bound on the cost increase is found by considering the case in which 10 percent of the 65–year–old cohort opts for postponed retirement. In the basic plan without inflation protection, the contribution rate rises from 9.13 to 9.20 percent of earnings; with inflation protection, from 10.90 to 10.99 percent. If only 3.5 percent opt for postponed retirement, the corresponding increases are more modest, from 9.19 to 9.22 percent and from 10.99 to 11.02 percent, respectively.

Cost Implications of Early and Special Retirement Provisions

To assess the cost implications of enriching an early retirement provision, or of introducing a special retirement provision, it is useful again to focus on the "entry–age–normal" contribution rate. As before, it is also useful to consider separately the case where pensioners receive cost–of–living adjustments equal to 60 percent of the inflation rate.

When an enriched early or special retirement provision is introduced, the contribution rate is estimated with two sets of assumed retirement rates. The first set consists of the retirement schedule assumed in the base case, and identifies the impact on the contribution rate *if* there is no change in retirement behaviour. The second set alters the schedule of assumed retirement rates to reflect the incentives contained in the early and/or special retirement provisions. In general, when retirement before the normal retirement age is made available on more attractive terms, the likelihood is increased that employees will opt to retire early.

Before examining the major results, it is useful to note the impact of changing the schedule of retirement rates *for a given plan*. Note, for example, that if more employees retire early in the basic plan, the contribution rate falls. This result is easy to explain. If a worker retires early, the worker forgoes the "back loading" of pension compensation that is intensified as the worker approaches the normal retirement age. Since early retirement is not subsidized, the result is a reduction in pension benefits due under the terms of the plan, and a corresponding reduction in the contribution rate. Perhaps surprisingly, a similar result occurs when early retirement is available on a subsidized basis. In effect, the subsidy associated with the reduction formula is small, and is not large enough to compensate for the worker's forgoing the "back loading" of pension compensation that would otherwise occur as the worker approached the normal retirement age. If the plan contains a special retirement provision, however, the subsidy *is* sufficiently large so that the contribution rate rises if more employees opt to retire before the normal retirement age. The more generous is the special retirement provision, the greater is the rise in the contribution rate when retirement is accelerated.

When the cost of the basic plan is compared with the cost of the basic plan enriched to include subsidized early and/or special retirement, the key results are as follows. If there is no inflation protection, the contribution rate rises from 9.19 percent to 9.68 percent when subsidized early retirement (only) is

introduced; to 10.17 percent when special retirement is liberalized to "60 and 20." If special retirement is further liberalized to "55 and 20," the contribution rate rises to 11.31 percent.

If the plan provides inflation protection, the increases in the contribution rate are higher. Introducing subsidized early retirement and special retirement at "62 and 20," for example, raises the contribution rate by 1.33 percentage points (12.31 less 10.98), compared to 0.98 percentage points (10.17 less 9.19) when there is no inflation protection. The greater rise in the contribution rate reflects the fact that those who retire early receive inflation protection for a longer period of time than do those who retire at the normal retirement age.

To conclude, introducing subsidized early retirement and/or special retirement *will* raise pension costs, and by a *considerable* amount if early retirement is heavily subsidized and if pension benefits receive at least partial inflation protection. In the long run, the incidence of these higher costs is likely to fall on employees, in the form of corresponding wage concessions. In the short–run, the incidence of these higher costs is likely to be borne by employers at least in part. If the introduction of enriched early or special retirement provisions is made *retroactive*, as is likely, new unfunded pension liabilities will be created. These additional costs are likely to be borne, in the main, by employers.

The Cost of Mandatory Inflation Protection Equal to 60 Percent of the Inflation Rate

Ontario recently established a Task Force on Inflation Protection, with a mandate to recommend a preferred means of implementing inflation protection. A much–discussed possibility, prior to the establishment of the Task Force, was the requirement that occupational pension plans provide inflation protection at least equal to 60 percent of the inflation rate, as measured by the consumer price index. It is thus instructive to calculate the cost of introducing inflation protection equal to 60 percent of the inflation rate, for future service only, in plans which previously provided no inflation protection. These cost increases, in turn, can be compared to those of introducing or altering a postponed retirement provision, and those of introducing or enriching an early or special retirement provision.

Introducing partial inflation protection where it did not previously exist *is* expensive, far more so than the cost of introducing or altering postponed retirement provisions. Indeed, inflation protection is more expensive than enriched early and special retirement provisions, at least if both apply only to future service. For example, the introduction of partial inflation protection into the basic plan raises the contribution rate from 9.19 to 10.98 percent, or by 1.81 percentage points. The addition of subsidized early retirement and special retirement at "62 and 20" to the basic plan, in the absence of inflation protection, raises the contribution rate by 0.98 percentage points.

Summary and Conclusions

The substantive points made above can be summarized as follows:

(1) The variation in plan costs associated with different postponed retirement provisions is not large. If the least expensive provision (no actuarial adjustment, no accrual) is replaced by the most expensive (actuarial adjustment, continued accrual), the contribution rate rises by about 0.10 to 0.15 percentage points, even if a full ten percent of the 65–year–old cohort opts for postponed retirement. The contribution rate rises by about 0.03 to 0.05 percentage points if, perhaps more realistically, only 3.5 percent of this age cohort opts for postponed retirement.

(2) Those jurisdictions (Quebec, Manitoba, Government of Canada) which have banned mandatory retirement have also banned the postponed retirement provision which provides for neither actuarial adjustment nor continued accrual. If the latter is replaced by continued accrual with no actuarial adjustment, the contribution rate rises by about 0.05 to 0.09 percentage points in the "high" postponed retirement scenario, and by about 0.01 to 0.03 percentage points in the "low" postponed retirement scenario.

(3) If employers introduce enriched early or special retirement provisions, the increase in plan costs *could* be quite large. Consider, for

example, a plan which provides for early retirement on an actuarial reduced basis, and does not provide for special retirement. If the plan sponsor introduces subsidized early retirement (5 percent reduction for each year that early precedes normal retirement) and special retirement at "62 and 20", the contribution rate rises by 0.98 percentage points if there is no inflation protection, and by 1.33 percentage points if there is inflation protection equal to 60 percent of the inflation rate.

(4) Any estimate of the increases in contribution rates subsequent to the introduction of subsidized early and/or special retirement must be viewed as tentative, since the estimate will depend on the schedule of assumed retirement rates. Nonetheless, it appears safe to conclude that the introduction of such provisions is likely to prove expensive, especially if the employer provides (or is required to provide) inflation protection. If enriched early and/or special retirement provisions are introduced retroactively, as is perhaps likely, the increases in the contribution rates identified in this chapter will understate the short–run increase in employer costs.

(5) To the extent that enriched early or special retirement provisions are introduced, retroactively, to induce employees to quit before the normal retirement age, these provisions are perhaps best viewed as an alternative to individual "buy–outs," subsequent to a ban on mandatory retirement.

(6) To provide perspective, it is useful to note that the introduction of mandatory inflation protection equal to 60 percent of the inflation rate, where previously no inflation protection existed, is likely to raise long–run pension costs by more than the enrichment of early or special retirement provisions.

17

Implications of a Mandatory Retirement Ban for the Cost of Employee Benefit Programs

Introduction

In the early days before pension plans were widespread, fixed retirement ages were the exception rather than the rule. Employees were allowed to stay at work as long as they could do an adequate job, while those who became incapable or disabled were usually awarded pensions by the employer. Fringe benefit programs were less extensive than they are now and more subject to the employer's discretion. There was probably less discrimination by age then than now, although the employers had more arbitrary power.

With the growth of pension plans, employees whose performance was failing could more easily be required to retire, for they had at least some income. Often retirement ages varied between the sexes — age 65 for men and 60 for women was common. The retirement age fixed by Bismark was not 65 as is commonly believed, but 70. The establishment of the Canada/Quebec Pension Plan in 1966 had a powerful influence in fixing 65 as the normal retirement age for both sexes. Most pension plans today have 65 as the normal retirement age, but allow postponed retirement on a year to year basis in exceptional circumstances with company consent. Where postponed retirement is allowed there is usually a later compulsory retirement age, such as age 70.

There are strong arguments in support of mandatory retirement — it makes room for promotion of younger employees, assists in forward planning, and avoids the embarrassing duty of an employer to fire an aging inefficient employee. Further, mandatory retirement simplifies the operation of pension and group insurance plans.

For further reference: Laurence Coward, *Implications of a Ban on Mandatory Retirement for Fringe Benefit Programs,* a report commissioned by the Task Force.

These arguments, based on tradition and practicality, are now considered less important than the human rights issues. Forced retirement is cruel if the retiree does not have a decent pension to live on. It may be cruel even if he or she has income, because it takes away the dignity and self–satisfaction of being part of the workforce. To be branded too old to be useful is highly damaging to the retiree's self–respect and peace of mind. There are important psychic benefits as well as financial benefits in working.

Some of the general concerns regarding pensions and employee benefit plans in the event of a ban on mandatory retirement were expressed by the Canadian Manufacturers' Association in their brief to the Task Force:

> Long–term disability coverage presents especially difficult problems. Coverage for employees over the age of 65 would be extremely costly. Furthermore, an employee over that age who becomes ill or injured would have a reduced prospect of returning to work. LTD should not become an alternate pension or retirement benefit.
>
> There are reasonable ways in which some employee benefits could draw a distinction according to age. At present, as outlined above, many government programs (such as CPP benefits, Old Age Security eligibility and so on) do draw a distinction based on age. It is our understanding that in the United States, the Age Discrimination in Employment Act, which prohibits discrimination in employment between the ages of 40 and 70, permits a reduction in benefits after age 65 if such reductions are cost–justified.
>
> Extending group life insurance coverage to those over age 65 would also have a dramatic impact on costs. These and other benefits would need to be reexamined as to their meaning for employees over age 65. Legislation should continue to allow such benefits to be reduced at the age of 65 (or at retirement if earlier than this age). Pension plans are enormously complex and would also require a transition period for study, analysis, adjustment and communication with employees.

Pension Benefits and the Quebec Act

What is the impact of flexible retirement on fringe benefits? Let us look at the Quebec Act which abolished mandatory retirement. The Act specifies how the pension rights of an employee who postpones retirement are to be protected.

In Quebec an employee is entitled to continue at work even though he or she has reached normal retirement age. Employment may continue even beyond the 71st birthday, the age under the Income Tax rules when pension payments from a

registered pension plan must begin. However, there is no interference with the employer's right to dismiss, suspend or transfer an employee for good and sufficient cause.

When an employee continues working after normal retirement age, payment of pension may be deferred until age 71 at latest. However, the employee may require that the pension be paid, in whole or in part, to the extent necessary to make up for a reduction of salary or wages while on deferred retirement; such a reduction might arise if the employee went part–time or were down–graded. Irrespective of that, the employee may, if the employer consents and if the plan permits, receive all or part of the pension while still working.

The amount of pension that has been deferred will have to be "revalorized", to use the Quebec expression. This means that the pension must be actuarially increased when it is eventually paid. The pension plan will have to specify how the revalorization will be done. There should be no extra liability on the pension fund. Indeed, according to the Act, the pension adjustment must create neither surpluses nor deficits in the pension fund, which will require a nice balancing trick on the part of the actuary.

Some employers would undoubtedly prefer to make every pension commence at normal retirement date even if the employee works beyond that date. For employers this is probably the simplest procedure. It creates neither a surplus nor deficiency in the pension fund. This procedure may be unattractive to the employee, however. Under the Income Tax proposals introduced on October 8th 1986 the tax–free rollover of pension payments into RRSP will be abolished after a few years of transition; if the employee cannot roll over the pension, the option to have it commence at age 65 will not be favoured.

The Quebec Act does not require the member of a contributory pension plan to make any contributions while on deferred retirement. If such contributions are made, the pension earned while on deferred retirement (over and above the actuarial increase just described) must be at least equal in value to the employee's contributions. Thus, on retirement the member will receive as a minimum:

(1) the pension due at age 65, plus

(2) the actuarial increase in that pension, plus

(3) the value of any post–age–65 contributions made by the member.

The provisions in the Quebec Act respecting pensions are logical and reasonable. If mandatory retirement were abolished by legislation in Ontario, the province would be well advised to follow the precedent set by Quebec. National employers, for obvious reasons, are strongly in favour of uniformity in provincial legislation.

Other Fringe Benefits

The Quebec Act is silent as to what employee benefits, other than pensions, must be provided those who postpone retirement. In all the widely publicized arguments and lawsuits on mandatory retirement across Canada, there has been remarkably little comment on the impact on group insurance benefits. Attention has concentrated on the meaning of the Canadian Charter of Rights and Freedoms, on performance appraisal, on the need for better personnel records and communications, on what constitute *bona fide* occupational requirements, and on the risks of legal actions for wrongful dismissal. The impact on fringe benefits of a ban on mandatory retirement has been largely ignored.

Taking the Charter's ban on discrimination by age at face value, all terms and conditions of work including employee benefits should continue without any change if an employee postpones retirement. This does not happen even to pensions under Quebec's law. As things now stand (in Quebec and elsewhere) coverage in health insurance, life insurance and long term disability plans nearly always terminates when the member reaches age 65. A reduced life insurance benefit is often continued after age 65 but as a rule other benefits cease. It is perhaps surprising that these provisions have not been challenged, because the arguments against mandatory retirement appear to be equally

applicable against cessation of benefits at an arbitrary age.

Group Life Insurance

The cost of life insurance rises so steeply with age that it would be costly to maintain it unchanged up to high ages. For example, the premium for a year's coverage at age 70 is about ten times the premium at age 45, thirty times that at age 25. Furthermore, the need for life insurance tends to decrease, generally speaking, with advancing age. The older person is likely to have paid off his house mortgage, acquired the capital goods he needs and finished financing his children's education. For these reasons life insurance for pensioners is usually a nominal amount, say $5,000, while active employees may need and be granted $50,000 or more.

The practical approach is to provide declining amounts of group life insurance for those who postpone retirement, so as to produce roughly equal costs from age 65 onwards. If this were done the amount of insurance at age 75 would have to be a little over half the amount at age 65.

This policy is supported by two other considerations. Under the federal Pension Benefits Standards Act and proposed Ontario legislation in Bill 170 pensions must be provided to the spouses of deceased pension plan members and pensioners. The amount of life insurance required by employees who postpone retirement will obviously be reduced if their spouses are entitled to pensions from the pension plan after death of the employee.

Also employees are taxed on the premiums paid for group life insurance in excess of $25,000 sum assured, to the extent that these premiums are paid by the company. For tax purposes the income of an individual is increased by his sum assured in excess of $25,000, multiplied by the average premium rate per $1,000 for the whole of the group life insurance plan. The inclusion of older employees increases the premium rate appreciably and in consequence increases the tax paid by younger employees. A separate group insurance plan for the older group would relieve this problem, but might be regarded as discriminatory.

In the United States the 1986 amendments to the Age Discrimination in Employment Act (ADEA) allow reductions in life insurance on five year age brackets starting at 65 or annual reductions. Under ADEA these five year brackets could provide the following percentages of unreduced life insurance: 65–69, 65 percent; 70–74, 45 percent; 75–79, 30 percent; 80 and over, 20 percent.

Accident Insurance

Travel accident insurance nearly always continues for employees who have postponed retirement, if they still travel on company business. Unless older people travel much more than younger ones on business, the travel accident risk is probably not dependent on age.

Basic accidental death and dismemberment insurance also remains after age 65 in many cases. AD&D is nowadays regarded as less essential and more misleading to employees than plain group life insurance. Reductions in AD&D insurance similar to those for life insurance should be allowed.

Health Insurance

While basic hospital and medical costs for employees are paid by provincial health plans, important supplementary services are not; these are usually insured. These include semi–private hospital accommodation, prescription drugs not covered by provincial health plans, convalescent care, private duty nursing, hearing and vision aids, and many other items. As an indication of cost, a health plan for a pensioner group can be obtained for about $30 a month single or $50 a month for a couple. The cost of course depends on the covered services and the deductible. If a health plan can be sold to pensioner groups then it is obviously possible to make it available to active employees who are over age 65.

There is no good reason why health insurance should not continue to be provided beyond age 65. The incidence and amount of claims grows with age, and health insurance costs can be four times as expensive for a pensioner as for an average active employee. However, there are offsets — for example OHIP pays the cost of most prescription drugs for people age 65 and

over. Also employers who pay the OHIP premiums of their employees will be relieved of this cost when the employees reach age 65.

All in all, health costs do not increase with age so fast as to make health insurance prohibitively expensive for older workers. Health insurance rates depend on age, rising to 180 percent of standard rate at age 59 and 240 percent of standard rate at age 60 on. As many companies continue major medical insurance for retired employees without any age limit, it could certainly be continued for all active employees if mandatory retirement were abolished.

Sick Pay and Disability Insurance

The problem with continuing disability insurance beyond normal retirement age is that cases may arise where it is almost impossible to determine if the employee is genuinely too ill to work or is malingering. Many health conditions become slowly and progressively worse as people grow older, making it difficult to draw the line between afflictions that justify a disability or sick claim and less serious aches and pains that the employee could reasonably be expected to endure while still at work. With advancing age it becomes more and more difficult to maintain claim control, using the words "claim control" in a positive, not in a negative, sense. Claim control is necessary to ensure that only fair and proper claims are paid; it must not be a way of reducing costs by seeking excuses to reject claims.

Another problem is that disability rates rise quite steeply with age. A "standard rate" is established for a young employee group, depending on the waiting periods and other conditions of the weekly indemnity plan. Insurance Company A charges 225 percent of standard rate for employees age 60 to 69 and 375 percent for employees age 70 and over. Insurance Company B charges 225 percent from age 60 to 64, 275 percent from 65 to 69 and 300 percent from age 70 on. In many companies the employee continues to accrue pension benefits while drawing disability benefit, which further adds to the company's costs. At present, insurance companies will not quote for an LTD plan covering disabilities that commence after age 65.

For these reasons there should be some cutoff rule for long term disability benefits. After all, the employee will not be left without income when the long term disability benefit ends, for he or she can then retire on pension. As indicated in the brief presented to the Task Force by the Canadian Life and Health Insurance Association, Inc.:

> Disability benefit provisions need to be carefully designed to coordinate well with the dates at which pensions become available. If employees continue to be eligible for disability benefits, then some practical rules will need to be devised to determine when an employee's disability status is to be changed to retirement status. This is important when retirement benefit differs from disability benefit.

Under the United States ADEA various acceptable LTD plans are specified. Generally ADEA requires benefit periods to continue to age 70 and for not less than one year if disability takes place after age 69. Any reduction in short term disability benefits would have to be justified on a cost basis.

It must be recognized that an older employee who has every intention of continuing to work may be absent for various periods because of sickness, much as if he or she were younger. It would not be reasonable to deprive such an employee entirely of sickness benefits and force him to retire. To continue weekly indemnity benefits or short term sickness benefits for employees who are beyond normal retirement age would be fair and feasible.

It is probably best to make a compromise with respect to long term disability benefits. A practical approach is to limit the benefit period to 26 or 52 weeks, after which the employee would be transferred to pensioner status.

Bonus, Savings and Stock Purchase Plans

There is no good reason why these should be modified, assuming that the older employee is worth his hire as much as a younger one. Apart from the incentive to save, bonus savings and stock purchase plans provide cash compensation and should be considered in the same light as salary.

Dental Insurance

As a relative newcomer in the employee benefit school, dental insurance is subject to fairly strict limits. The services are carefully defined and there may be a maximum of $1000 per person per year. The cost may be around $30 a month per person. Generally dental insurance terminates at the end of the contract year after age 65 is reached — normally on December 31 after the 65th birthday — but the reason for the termination rule is not clear. Typically the most expensive dental work is done on employees under 65, and only maintenance is required after that age. Hence there is no reason why dental insurance should not be extended to employees over normal retirement age, with the cooperation of the insurance company.

Conclusion

A ban on mandatory retirement raises questions concerning the continuation of employee benefits for employees who postpone retirement. It is suggested, as a practical matter, that the benefits should be treated as follows:

Pensions: In fairness to employees who postpone retirement, the pension should commence at a normal retirement date or should be increased in the period up to actual retirement date. Otherwise the value of the employee's pension rights is reduced by postponed retirement.

Group Life Insurance: As the cost of life insurance for a year rises sharply with age, a reduced schedule should be allowed to equalize the employer's costs by age.

Accident Insurance: Travel accident insurance should be continued. AD&D should be treated the same as life insurance.

Health Insurance: Should be continued.

Sick Pay and Disability Insurance: Short term sick pay and weekly indemnity benefits should be continued. The benefit period for long term disability insurance should be limited to one or two years if the employee is over age 65.

Bonus, Savings and Stock Purchase Plans: Should be continued.

Dental Insurance: Should be continued.

18

Implications of a Mandatory Retirement Ban for Wrongful Dismissal, Systemic Discrimination, and Reasonable Accomodation

Wrongful Dismissal

If an employee is summarily dismissed by his or her employer in circumstances where there is no "cause", in the narrow legal sense of that term, the employee will have a claim in damages against the employer in an amount equal to what the employee would have received in wages, salary and benefits during a period of reasonable notice of termination had such notice been given. If the work force is organized, the employee's union will usually be able to put forward a successful grievance in this situation, leading to reinstatement and compensation for lost wages, salary and benefits. It has been recognized, however, that termination at 65 or some later age in accordance with an established mandatory retirement policy, consistently applied, does not normally constitute wrongful or unjust dismissal. Put another way, there is "cause" in these circumstances.

Should the Human Rights Code be amended so that mandatory retirement is no longer permitted at 65, this *may* open the door to many wrongful dismissal lawsuits or grievance arbitration proceedings that could not have been pursued in the past.

So far as grievance arbitration is concerned, an arbitrator may be expected to find that an employee was unjustly dismissed if he or she was terminated because of age in the face of a Code prohibition on mandatory retirement.

The fact that the employer's conduct is prohibited by the Code, which has its own administrative machinery, would not oust the jurisdiction of the arbitrator unless, of course, the collective agreement so provided. Indeed, many collective agreements impose a positive obligation on the employer to act in a non-discriminatory fashion, in compliance with the Code. If the agreement, by its own terms, involves discrimination against any person on the basis of age (among other grounds), contrary to the Human Rights Code or the Charter of Rights, it is deemed by Section 48(b) of the Labour Relations Act not to be a collective agreement for the purposes of that Act. Therefore, if the definition of age in the Code were altered to eliminate any upper limit, an agreement between a union and an employer providing for a mandatory retirement age of 65 would not constitute a "collective agreement." It would not, therefore, be subject to arbitration nor would it serve as a bar to certification of another union to represent the affected employees, unless an exception to the Code's prohibition of age discrimination applied in the circumstances. Even if such an exception were to apply, the "collective agreement" would still be defective if it were found to violate the age discrimination prohibition of the Charter.

It would appear that in practice the two remedial systems, under the Code and under a collective agreement, can subsist side by side in most situations. An employee may even get "two kicks at the can" by launching a complaint of discriminatory termination through his or her union and through the Human Rights Commission. However, the authorities are divided on the question of whether an issue of discrimination can be re-visited by a human rights tribunal if the same issue has already been dealt with by an arbitrator. The preferred view is that it can, given the different purposes, interested parties and machinery involved in the two schemes of dispute resolution.

The situation with respect to damage actions for wrongful dismissal through mandatory retirement is much more problematic. The starting point for any analysis must be the Supreme Court of Canada decision in *Board of Governors of Seneca College* v. *Bhadauria*. In this case the plaintiff claimed damages from a community college for denying her a job on the basis of her race or national origin, conduct prohibited by the Ontario Human Rights Code. Had the action

---

For further reference: Colin H.H. McNairn, *Life Without Mandatory Retirement: The Legal Regime*, a report commissioned by the Task Force.

complained of been termination from employment, on the specified grounds, the plaintiff would have been able to frame her claim as a traditional action for wrongful dismissal. As it was, there was no recognized civil claim for wrongful or negligent refusal to hire on which she could rely. Therefore, she had to put her faith in the Code and the public policy evidenced by it, although the Code's remedial processes did not include civil damages. The court concluded that the comprehensive administrative and adjudicative features of the Code foreclose any civil right of action based on a breach of the Code and also preclude any common law action based on the public policy expressed in the Code.

It can be argued that a claim for wrongful dismissal founded on an employer's action that happens to be in violation of the Code is significantly different in that wrongful dismissal is an established cause of action and the public policy of the Code need only be invoked by the plaintiff in a subsidiary way to show that the basis for the employer's conduct ought not to be recognized as "cause". On this theory the *Bhadauria* case might be distinguished. However, there is sufficient uncertainty about the reach of the *Bhadauria* principle that any amendment to the Code to prohibit mandatory retirement might be accompanied, for the sake of clarification, by a further amendment indicating whether or not the prohibitions of the Code may be taken into consideration in a judicial determination of whether or not an employer has terminated an employee "for cause". This would then determine if extra–Code proceedings could be brought in respect of wrongful dismissal allegations that were capable of being dealt with under the Code. If such actions are to be authorized, it may be appropriate to limit such proceedings so as to accommodate the role of the Ontario Human Rights Commission. The approach and the experience in the United States in this regard, which are discussed below, may be instructive.

Even if the Human Rights Code precludes proceedings in the courts for wrongful dismissal on account of age, it may be expected that some individuals employed in the public sector who have been so terminated will, nonetheless, commence court actions on the theory that their employer has violated their constitutional right to equality, without discrimination on the basis of age, set out in Section 15 of the Charter of Rights and Freedoms. An ordinary statute such as the Code could not prevent or restrict proceedings of this kind, which are of a constitutional order. To date such age discrimination actions based on the Charter have had limited success.

In the United States there has been a large increase in the number of reported court cases involving age discrimination since the enactment of the Age Discrimination in Employment Act. That Act clearly contemplates private actions, in Section 7(c)(1), which provides as follows:

> Any person aggrieved may bring a civil action in any court of competent jurisdiction for such legal and equitable relief as will effectuate the purposes of this act.

However, no civil action may be commenced unless a complaint is first filed with the Equal Employment Opportunity Commission, the agency charged with the administration of the Act, and a prescribed time period has elapsed to allow the EEOC to try to effect an informal settlement. The right of an individual to bring action is superseded if the EEOC commences court proceedings to enforce the complainant's rights under the Act.

Discrimination against Older Employees that may Encourage Retirement

There can, of course, be age–based distinctions in pensions, group insurance and other employee benefit plans that, while not forcing retirement, may nonetheless penalize older workers who continue on the job past the normal retirement age. Section 24 of the Human Rights Code allows some such distinctions, despite its prohibition of age discrimination, that is those that are of a kind permitted by the regulations under the Employment Standards Act. A review of those regulations is beyond the scope of this report. It should be noted, however, that for the purposes of the benefit plan provisions of the Employment Standards Act and the regulations thereunder, the term "age" is defined in precisely the same way as under Section 9(a) of the Human Rights Code — that is a lower limit of 18 years and an upper limit of 65 years. Any modification of the upper limit in the Code's

definition should logically be accompanied by a comparable change to the equivalent definition in the regulations under the Employment Standards Act.

Systemic Discrimination Against Older Workers

Section 10(1) of the Human Rights Code provides as follows:

> A right of a person under Part I is infringed where a requirement, qualification or factor exists that is not discrimination on a prohibited ground but that results in the exclusion, restriction or preference of a group of persons who are identified by a prohibited ground of discrimination and of whom the person is a member, except where,
>
> (a) the requirement, qualification or factor is reasonable and *bona fide* in the circumstances; or
>
> (b) it is declared by this Act ... that to discriminate because of such ground is not an infringement of a right.

The first exception is also subject to the "duty to accommodate", which is discussed in the next section of this paper.

The Code thus addresses systemic discrimination or adverse impact discrimination — that is action or conduct that may be neither intentionally nor patently discriminatory but that has a disproportionate effect on the members of a group distinguished by one of the characteristics referred to in the list of prohibited grounds of discrimination. This expansion of the basic prohibitions of the Code beyond obvious discrimination could conceivably apply to the benefit of older workers, including those 65 or over if the Code's definition of age is so expanded. For example, a general lay-off program that selected those making a high salary for termination might be shown to encompass a disproportionately large number of older workers and, therefore, to be discriminatory, subject to the employer being able to establish that salary level was a reasonable and *bona fide* factor to use in such a program.

There is a continuing debate in the United States as to whether this disparate impact analysis, which had its origin as a judicially developed approach to Title VII of the Civil Rights Act, is at all appropriate for age discrimination cases.

Mandatory Retirement and Reasonable Accommodation

As a result of amendments to the Human Rights Code made in 1986 certain of the statutory exceptions to the prohibition of age and other discrimination in the Code have been limited by requiring the person relying on the exception to establish that those affected by his or her actions cannot be reasonably accommodated. These amendments will put an extra burden on the employer in many age discrimination cases. In particular, if an employer argues in response to a complaint by one of its employees, that being less than a particular age is a bona fide occupational qualification (B.F.O.Q.) for a particular job, the Human Rights Commission, a board of inquiry or a court may not give effect to this argument,

> unless it is satisfied that the circumstances of the (employee) cannot be accommodated without undue hardship on the (employer) considering the cost, outside sources of funding, if any, and health and safety requirements, if any. (Section 23(2))

Likewise, if an employer is faced with a complaint that a particular job requirement constitutes systemic discrimination on the basis of age, it will be unable to successfully claim that the requirement is "reasonable and *bona fide* in the circumstances" (in the sense of Section 10(1)(a) of the Act) unless the Commission, board or court,

> is satisfied that the needs of the group of which the (employee) is a member cannot be accommodated without undue hardship on the (employer) considering the cost, outside sources of funding, if any, and health and safety requirements, if any. (Section 10(2))

The cabinet is authorized to prescribe standards, by regulation, for assessing what is undue hardship. Any such standards are to be considered by the Commission, a board or a court in determining whether undue hardship will result from any suggested method of reasonable accommodation. At the present time no such standards have been promulgated.

The concept of reasonable accommodation found its way into Canadian human rights decisions,

from its place of birth in the United States, even before it was referred to in the legislation. It has been considered relevant in cases of discrimination on the basis of religion and discrimination on the basis of handicap. For example in *Re Ontario Human Rights Commission & Simpsons–Sears Ltd*, the Supreme Court of Canada held that Simpsons–Sears had an obligation to take reasonable steps to accommodate the religious observances of an employee who was a Seventh Day Adventist and, as such, could not work on Saturdays. An offer of part–time work, involving a reduction in hours and wages by one–half was held to fall short of satisfying that obligation in the circumstances of that case. The Supreme Court had this to say about the employer's duty to accommodate:

> The Code must be construed and flexibly applied to protect the right of the employee who is subject to discrimination and also to protect the right of the employer to proceed with the lawful conduct of his business. The Code was not intended to accord rights to one to the exclusion of the other.
>
> Accepting the proposition that there is a duty to accommodate imposed on the employer, it becomes necessary to impose some realistic limit on it. The duty in a case of adverse effect discrimination on the basis of religion or creed is to take reasonable steps to accommodate the complainant, short of undue hardship: in other words to take such steps as may be reasonable to accommodate without undue interference in the operation of the employer's business and without undue expense to the employer.
>
> The employer must take reasonable steps towards (accommodation) which may or may not result in full accommodation. Where such reasonable steps, however, do not fully reach the desired end, the complainant, in the absence of some accommodating steps on his own part ... must either sacrifice his religious principles or his employment.

An important aspect of this decision is its recognition that the employer will have the onus to establish that it could not have reasonably accommodated the complainant "for the employer will be in possession of the necessary information to show undue hardship"; but that onus "will not be a heavy one in all cases". This allocation of the burden of proof appears to be consistent with the provisions of the Ontario Human Rights Code, cited above, dealing with reasonable accommodation, which were enacted after the *Simpsons–Sears* decision.

The new Code provisions are sufficiently broad to apply in the case of age discrimination, although there is no experience in relation to reasonable accommodation in this context. Thus, if an employer were to impose a mandatory retirement age of, say, 65 for those in a particular line of work (assuming discrimination on the basis of such an age was covered by the Code), the employer could be called on to show not only that this was a B.F.O.Q. but that the job requirements for older workers in this particular position could not be modified without undue hardship. There may be some doubt as to whether an adverse effect on general employee morale as a result of variable job responsibilities, depending on age, could go to show undue hardship since the Code describes that expression in terms of cost, health and safety factors. It is not clear whether these considerations are intended to be exhaustive of the criteria for undue hardship. In the broad sense, a deterioration in the morale of employees may be said to relate to cost if it leads to inefficiency and to resignations.

Assuming that the employer could show undue hardship, is there a further obligation to re–locate this 65 year old employee in a different position if that could be done without undue hardship? The Code is silent on this question. But, having imposed an express obligation to afford reasonable accommodation in some specific situations, the recent amendments to the Code may have foreclosed the possibility of an implicit obligation to accommodate in other situations. The Code seems to necessitate accommodation of the employee in relation to the requirements of a particular job rather than accommodation of an employee somewhere within the total personnel structure of the employer. If the law of Ontario is to impose the latter obligation the Code should be amended to make it clear that this is the case. In this event undue hardship would likely need to be more broadly defined that it is at present. There may be constraints other than those of cost, health and safety, such as the terms of a collective agreement, that would inhibit the freedom of an employer to make a lateral transfer of an employee who was no longer able to meet the age requirement for his or her current job.

19

New Dispute Settlement Mechanisms

Introduction

If the Ontario government wishes to contemplate a dispute settlement mechanism as part of its recommendations in relation to the issue of abolishing or restricting mandatory retirement in the Province of Ontario, possible limitations on provincial jurisdiction imposed by Section96 of the *Constitution Act, 1867* must be considered. The basic constitutional question is whether a provincially appointed tribunal, board or dispute settlement body otherwise described, empowered to hear and resolve labour disputes arising from a new government policy on mandatory retirement, would be exercising functions analogous to the jurisdiction exercisable by the county or superior courts: i.e. functions falling exclusively to the jurisdiction of judges appointed by the federal government pursuant to Section 96. The constitutional value protected by the section would appear to be the maintenance of an essentially *unitary* court structure within the Canadian federal state.

Section 96 provides simply as follows:

> 96. The Governor General shall appoint the Judges of the Superior, District and County Courts in each Province, except those of the Courts of Probate in Nova Scotia and New Brunswick.

However, it has generated some of the most convoluted and problematic jurisprudence in Canadian constitutional law. It caused little difficulty before the modern era of big government and social welfare statutes, but has since become a major stumbling block to the provision of administrative remedies by provincial governments.

For further reference: Scott Fairley, *Some Implications Concerning Employer–Employee Relations Should Mandatory Retirement be Abolished*,a report commissioned by the Task Force.

The Modern Test for Conformity with Section 96

In *Reference re Residential Tenancies Act*, a 1981 decision of the Supreme Court of Canada, Mr. Justice Dickson (as he then was) elaborated a three–fold test for provincial legislation in relation to Section 96. The following analysis outlines and applies the *Residential Tenancies* test *simpliciter* to a hypothetical tribunal empowered to deal with employment disputes involving allegations of unjust dismissal: one possible scenario which could follow a government policy decision to abolish mandatory retirement in Ontario.

The *Residential Tenancies* test was summarized by the late Chief Justice Laskin in the *Massey–Ferguson* case as follows:

1. Does the challenged power or jurisdiction broadly conform to the *jurisdiction* exercised by Superior, District or County Courts *at the time of Confederation*?
2. Is the function of the provincial tribunal within its institutional setting a judicial function, considered from the point of view of the nature of the question which the tribunal is called upon to decide or, to put it in other words, is the tribunal concerned with *a private dispute* which it is called upon to adjudicate through the application of a recognized body of rules and in a manner consistent with fairness and impartiality?
3. If the power or jurisdiction of the provincial tribunal is exercised in a judicial manner, does its *function as a whole* in its entire institutional context violate Section 96?

The first stage of the test is a question for historical analysis. If the answer is "no" the inquiry ends and there is no constitutional impediment posed by Section 96. If the answer is "yes" then the constitutional adjudicator moves to the next level of inquiry to ask whether the function *in its institutional* setting is primarily judicial in character. If analysis of the institutional setting prompts a negative answer with respect to the possible exercise of judicial functions, again, the inquiry ends and there is no Section 96 difficulty. If the answer is "yes" the adjudicator will proceed to the last stage of the inquiry and ask whether, notwithstanding that the provincially appointed body is exercising

judicial functions, are they nevertheless ancillary to broader non–judicial (policy–making and policy implementation) functions taken as a whole. If so, then the legislative scheme may get an eleventh hour reprieve from Section 96. Otherwise, however, it will be considered *ultra vires* the province.

The modern judicial approach exemplified by the *Residential Tenancies* test, is to avoid conflict between bona fide provincial legislative schemes that are not direct attacks on the constitutionally protected unitary court structure and Section 96. However, there are limits. As stated by Mr. Justice Dickson near the end of his judgment:

> However worthy the policy objective, it must be recognized that we, as a Court are not given the freedom to choose whether the problem is such that provincial rather than federal, authority should deal with it. We must seek to give effect to the Constitution as we understand it and with due regard for the manner in which it has been judicially interpreted in the past. If the impugned power is violative of s. 96 it must be struck down.

With the foregoing admonition in mind, the *Residential Tenancies* test, as applied to an "employment (retirement) disputes" tribunal, appears to warrant full consideration.

The Historical Test

The basic question here is whether private law suits alleging wrongful dismissal, the likely fare of a dispute resolution body designed to deal with the litigation fallout from the abolition of mandatory retirement, are broadly conformable to the pre–Confederation jurisdiction of Section 96 courts. Because of recent complications to the jurisprudence, it is important to note that this first stage of analysis is phrased in positive terms: is the provincially claimed jurisdiction "identical or analogous to *a power* exercised by s. 96 Courts at Confederation", not that it was exclusively vested in those courts, but was "broadly conformable" to the jurisdiction exercised by s.96 courts on or before July 1, 1867.

The short answer to this first basic question is a rather unequivocal affirmative. In Ontario, there is no doubt that, prior to Confederation, actions in *assumpsit* for wrongful dismissal were brought in Ontario county and superior courts. While common law protections for employees were minimal at this point in time and labour relations law may, in many respects, be considered a modern phenomenon, the adjudication and disposition of discrete disputes between employer and employee in relation to dismissal or removal from the workplace constitutes a prima facie exercise of jurisdiction conformable to that of a Section 96 court at Confederation. However, at least since the 1983 decision of the Supreme Court of Canada in *Attorney General for Quebec* v. *Grondin* (hereinafter *Regie du Logement*), elements of uncertainty have been injected into this threshold inquiry for provincial legislation allegedly violative of Section 96.

The decision of the Court in *Regie du Logement* upheld the constitutionality of Quebec legislation establishing a residential tenancies dispute settlement tribunal analogous to Ontario legislation declared *ultra vires* by the Court in the *Residential Tenancies* ruling of 1981. The different result in the Quebec case, — both were unanimous decisions of the Court — appears to have been based on the historical finding by Chouinard J. that "some jurisdiction over matters between lessors and lessees, at least as regards the collection of rent" and, in at least one instance, over leases resided in Quebec courts of summary jurisdiction prior to Confederation. In the result, Chouinard J. concluded: "that suffices for the historical step of the test".

Unfortunately, the Chouinard analysis raises more questions than it answers with respect to the historical test set out in *Residential Tenancies*. Prior to *Regie du Logement*, the notion was that subject matter broadly conformable to the jurisdiction exercised by a Section 96 court did not necessarily impose the further condition of exclusivity, which is what the Chouinard judgment now implies. Moreover, it appears that Section 96 limitations may vary from province to province depending on the idiosyncracies of summary court jurisdiction prior to Confederation. Otherwise, *Residential Tenancies* may have been wrongly decided on the first stage of the test it propounds. We hasten to add, however, that the Court clarified neither of these two possible consequences to its decision in *Regie du Logement* or their possible conflict with the result in *Residential Tenancies*.

In *Asselin* v. *Industries Abex Ltee* a majority of the Quebec Court of Appeal followed the judgment of Chouinard J. in *Regie du Logement*

and upheld the jurisdiction of provincially appointed arbitral adjudicators under the *Labour Standards Act* for employees not otherwise covered by dispute settlement provisions in a collective agreement under the first step in the *Residential Tenancies* analysis. Even though the jurisdiction conferred under the Act was "broadly conformable" to that of Section 96 courts, the fact that inferior courts and justices of the peace had jurisdiction to adjudicate disputes between master and servant and to award damages to an employee who was illegally dismissed still served to save the provincial position. On the ground that "it cannot be said that the Superior and Circuit Courts had *exclusive* jurisdiction before Confederation", the majority applied *Regie du Logement* and ruled the legislation *intra vires* the province.

The separate opinion of L'Heureux Dube' J.A. agreed in the result, but not on the application of the first stage of the *Residential Tenancies* test, noting that "a large majority of these powers were exercised by the courts of justice at the time of Confederation." In view of Madame Justice L'Heureux Dube''s later remarks under the third stages of the *Residential Tenancies* test, there would appear to be some judicial sympathy for our criticism of *Regie du Logement*. In the meantime, however, both the conflicting authority and attendant confusion persists in the law.

The foregoing wrinkles to the "history" test make it impossible to provide a definitive answer to this stage of the inquiry. It is clear that actions in contract for wrongful dismissal were subject to the jurisdiction of pre– and post–Confederation Ontario county courts, courts of common pleas and Queen's Bench. At the same time it is also true that minor actions in contract similar in character could be disposed of by inferior courts.

In pre–Confederation Ontario, the united Province of Canada established Division Courts, which were not "Courts of Record". These courts exercised jurisdiction in all personal actions in debt or damages to a limit of $40.00, and over "éaùll claims and demands of debt, account or breach of contract, or covenant, or money demand..." not in excess of $100.00; it clearly extended to contracts of employment. However, county court judges presided over these Division courts in their respective counties. Post–Confederation jurisprudence suggests that the province could have had provincial appointees preside over the Division Courts at any time, but the fact was that Section 96 judges presided in the Division Courts prior to Confederation and provincially appointed magistrates did not.

Thus, we can say that the jurisdiction in question is broadly conformable to that exercised by Section 96 courts at Confederation and generally (not exclusively) the prerogative of federally appointed judges, but only, it seems, by virtue of administrative rather than constitutional necessity. The jurisprudence is still rather indeterminate. Therefore, it is only prudent to continue the inquiry beyond the first stage of the test.

The Institutional Setting

Once the jurisdiction of the dispute settlement body is recognized as something a Section 96 court might otherwise do, the question is whether the exercise of the function somehow alters in a particular institutional context. The jurisdiction of provincially appointed administrative tribunals has been upheld under Section 96, primarily on determinations that the adjudication of a formal *lis inter partes* was not the essential purpose behind the legislative enactment, nor the primary function of the administrative body created under it.

In *Residential Tenancies*, Dickson J. identified the judicial task as involving "questions of 'principle', that is, consideration of the competing rights of individuals or groups. This can be contrasted with questions of 'policy' involving competing views of the collective good of the community as a whole..." Thus,

> the hallmark of a judicial power is a *lis* between parties in which a tribunal is called upon to apply a recognized body of rules in a manner consistent with fairness and impartiality. The adjudication deals primarily with the rights of the parties to the dispute, rather than considerations of the collective good of the community as a whole.

By and large, labour boards survive Section 96 scrutiny at this stage of analysis because they have a broad mandate to make decisions in pursuit of the collective good of the community, i.e. by advancing the policy of facilitating

harmony between organized labour and management in an industrial and post–industrial economy. Human rights tribunals have survived under a similar rubric of the "collective good" in their pursuit of general policies of non–discrimination in relation to the provision of goods, services and living accommodation to the public. Accordingly, a policy rationale, for example, of ensuring equality of access to rental housing for visible minorities in metropolitan areas provides an effective shield to Section 96 attacks on tribunal decisions in specific cases as a necessary adjunct to policy implementation.

Is a similar argument open for a tribunal charged with dealing with an anticipated increase (here, we are assuming a "worst case" scenario) of wrongful dismissal suits stemming from the abolition of mandatory retirement? To the extent that the legislative scheme is premised only on the policy of wanting to conform with the spirit and intent of the *Canadian Charter of Rights and Freedoms* in relation to the enumerated category of age in the non–discrimination provisions of Section 15, the case is a weak one. Legislative recognition of a constitutionally protected individual right does not necessarily constitute an independently sustainable collective social goal.

Similarly, settlement by a tribunal of what may be essentially viewed as discrete cases of an employee's right to be free of discrimination on the basis of age and an employer's bona fide entitlement to terminate for cause may not succeed in making the jump from the realm of principle to policy as described by Dickson J. in *Residential Tenancies*. This jurisprudence is potentially analogous to the application of "a recognized body of rules..." referred to by Dickson J. as the hallmark of a *lis*, to the extent that principle and precedent may be said to rule the day in such cases.

On the other hand, it is possible to articulate a strong policy rationale for doing away with mandatory retirement. To the extent that the constitutional limitations imposed by Charter Section 15 remain uncertain and the legislation is linked to policy objectives already pursued by other provinces in abolishing mandatory retirement, *independent* of any constitutional directive to do so, it may be possible to demonstrate a policy–oriented institutional setting sufficient to sustain a specialized tribunal which does not violate Section 96.

Judicial Functions Ancillary to Policy Implementation

The third step in the *Residential Tenancies* test posits that, even though a judicial function is exercised and the institutional setting does not fundamentally alter the character of the function as "judicial", the context in which the function is exercised is sufficiently different from the traditional venue of the judiciary to avoid conflict with Section 96. The leading authority in this respect, as applied by Dickson J. in *Residential Tenancies*, is *Tomko* v. *Labour Relations Board (N.S.)*, which upheld the power of a labour tribunal to issue injunctions, undoubtedly a Section 96 court function, but one which the province could invest in a body of its own creation, provided the institutional context was sufficiently novel or distinct from the judicial context in which an injunction would normally apply.

In the *Asselin* case, the separate concurring opinion of L'Heureux–Dube' J.A. upheld the powers of labour arbitrators granted under the Quebec *Labour Standards Act*, under this third step of the *Residential Tenancies* test. In this respect, it is useful to quote the reasons of Madame Justice L'Heureux–Dube at length:

> My preference would be to focus debate on the modern aspect of labour relations as compared to the situation in 1867 ... This is especially true for the *Labour Standards Act* which gives the employee a right to his job, regardless of the individual employment contract, and gives the arbitrator extended powers, including the power to reinstate an employee. If that is true of s. 128(1) of the Act in particular, I would say that all the other powers at issue are derived from the same philosophy of labour relations, from the same concept which runs from conciliation to negotiation and to arbitration of labour disputes. The arbitrator is not only part of the whole process, he is also that to which the various stages in that process lead...
>
> Therefore, it is my view that on this basis a province may, within its area of jurisdiction (in this case exclusive jurisdiction), grant judicial powers to a provincial body or to judges or individuals whom it has appointed, even if such powers, exercised *per se* in 1867 by the superior courts, exclusively or otherwise, are exercised in a different institutional context. In my opinion, this is the basic thrust of the decision in *Reference re Residential Tenancies Act*, supra. The powers are the same, or at any rate similar, but they arise from a completely different conceptual context

> which militates in favour of specialization, rearrangement and institutionalization. The *Labour Standards Act* seems to me to come within this framework and the powers of the arbitrator naturally belong there since they are a necessary accessory to the operation of this new right to work, new at least in comparison to the times of Confederation.

If one takes the analysis of the Quebec *Labour Standards Act* by L'Heureux–Dube' J.A. as a model, then an Ontario tribunal premised on similar foundations shows considerable promise for resisting a Section 96 attack. The advantage here is that a third stage defence under the *Residential Tenancies* is free from any dependence on the quirks of history as to what jurisdiction Ontario inferior courts *may* have exercised immediately prior to Confederation.

However, the approach of L'Heureux–Dube' J.A. in *Asselin* is contradicted by authority of co–equal weight from the Nova Scotia Court of Appeal in Re *Sobey's Stores Ltd.* and *Yeomans et al.* In that case, a unanimous judgment by Hart J.A. invalidated Sections 67A(2) and (3) of the Nova Scotia *Labour Standards Code*, which empowered a labour standards Tribunal to determine whether senior employees (over ten years seniority) had not been dismissed for just cause, on a finding that the legislation was an *ultra vires* infringement of Section 96.

Hart J.A. applied all three stages of the *Residential Tenancies* test, as His Lordship would be required to do prior to reaching any finding of *ultra vires*. The *Sobeys* approach to the first two stages of the test accords with the analysis presented above. In particular, it diverges from the majority opinion by Nolan J.A. in *Asselin* on the historical portion of the test. However, Hart J.A. also differs from L'Heureux–Dube' J.A. in *Asselin* on the third stage of the test, reasoning as follows:

> In my opinion, it is completely unnecessary to pass the question of whether or not an employee has been unjustly dismissed to a provincial tribunal. The question is simply a matter of dispute between two parties to a contract of employment and is not a matter ancillary to the broad social purpose of obtaining industrial peace as held in the Labour Relations Board cases. Section 67A is simply one piece of social legislation which was coupled together with a group of others relating to labour standards as a convenient single statute. There is, in my opinion, no valid need to have the determination of such a dispute resolved by the Labour Standards Tribunal.

Since the legislative schemes scrutinized in *Asselin* and *Sobey's* respectively, are virtually analogous for purposes of Section 96, the opposite results are a matter for concern. In our view, the L'Heureux–Dube' analysis is the more persuasive of the two in its analysis of the third stage of the *Residential Tenancies* test. More specifically, Hart J.A. may have paid insufficient attention to the context in which the dispute settlement mechanism provided by the Nova Scotia legislation was placed. In this respect, the third stage of the test could have been misapplied and, in any event, appears to run counter to contemporary judicial preferences for avoiding Section 96 conflicts with otherwise valid provincial legislative schemes. Leave to appeal was refused in *Asselin* but allowed in *Sobeys*; however, argument is unlikely to be heard before the 1987–88 Term.

Thus, notwithstanding *Sobey's*, a very strong argument can be made that a specialized tribunal established in conjunction with a policy decision by the Ontario government to abolish mandatory retirement, would not be objectionable under Section 96. Such a conclusion may be supported on the following grounds:

- the right to work free from arbitrary discrimination on the basis of age, either as a result of employer policy or legislative fiat pursuant to previous policy choices by government is a new adjustment within the field of labour relations which is already recognized as a novel institutional context distinct from traditional judicial functions;
- protection from discrimination on the basis of age, as an adjunct to employee rights in the workplace already has a policy context (though more limited in scope) prescribed by the *Ontario Human Rights Code*. It follows that a "Retirement Review Board" or other body similarly described, gains added constitutional credibility from the imprimateur previously granted to Human Rights Commissions.
- if the powers of the tribunal are similarly contextual (e.g. if they include the power to reinstate an employee along with the traditional judicial task of assessing damages for wrongful dismissal) within the novel and specialized venue of retirement review (certainly not something pursued by a

Section 96 court prior to Confederation), such a tribunal would be highly resistant to constitutional attack for assuming the guise of a Section 96 court, even though the functions exercised by the tribunal are judicial in character.

Immunization from Judicial Review

Even if the *Residential Tenancies* test is complied with at any one of these three stages, an additional problem arises if the legislative scheme also extends to proscribe any appeal from decisions of the board established to review and decide upon retirement related disputes. The only limitation in this regard is that privative clauses must not go so far as to preclude review by the superior courts on grounds of jurisdictional error. Privative clauses covering questions of fact and law are clearly permissible on the authorities.

Conclusion

The jurisprudence of Section 96 seldom yields clear answers. Further to that general observation, the conclusion to this opinion is correspondingly problematic. The conflicting opinions expressed in *Asselin* and *Sobeys* illustrate the point. However, while we can provide no guarantee of freedom from Section 96 problems, it is fair to say that the Government of Ontario would have good defences to a Section 96 challenge in the event it proceeded with a recommendation along the lines discussed above and elsewhere in this report.

The argument does not change significantly whether or not the dispute settlement tribunal supplants or merely supplements existing dispute settlement provisions in the collective bargaining context. In *Asselin*, for example, the Quebec legislation provided for arbitral adjudication only for employees not covered by other grievance procedures. However, the constitutional position of any contemplated tribunal is strengthened in direct proportion to the extent of its integration into a broader administrative scheme. The perception that a proposed tribunal is simply going to be usurping a traditional judicial function in relation to claims of unjust dismissal correspondingly weakens the provincial position.

On the basis of the foregoing, in our view Section 96 should not be considered an insuperable impediment to potential dispute settlement strategies which involve the establishment of a tribunal to deal with any increased incidence of wrongful dismissal as a result of a ban on mandatory retirement.

PART 4

Policies For Flexible Retirement

Contents

20

Employment Sharing for Older Workers

Senior Citizen Activities

Mandatory retirement at age 65 results in many Ontario employees experiencing an abrupt change from full–time work to no work at all. For both psychological and economic reasons, it may be desirable to facilitate a more gradual approach to retirement in which employees are given an opportunity to reduce their work time in stages (with a proportionate reduction in pay) either before or after age 65. Work time reductions could take the form of job sharing (reduced work days or reduced work weeks), increased unpaid annual vacations, or periodic unpaid "sabbatical" leaves (deferred salary leave plans). It may also be desirable to facilitate retirement earlier than age 65 in situations in which it is desired by employees but is currently unattractive due to consequences for pensions or other benefits.

Although it may appear that work schedules are set unilaterally by the employer, economic analysis suggests that both employer and employee preferences will have an impact. The number of hours an employee wants to work and the employee's preferred scheduling of those hours are affected by the wage rate, working conditions, the employee's financial assets and liabilities, the employee's age, health, number of dependents and other factors. In a competitive labour market, the employer will find it advantageous to take account of employee preferences in setting work schedules because a more desirable schedule will reduce the wage or other forms of compensation required to attract and retain suitably qualified workers. Although it may be impractical to tailor work schedules to individual preferences, economic analysis suggests that employers would be expected to establish schedules which are broadly consistent with preferences of the majority of employees.

For further reference: Frank Reid, *Policies for Flexible Retirement: An Analysis of Employment Sharing for Older Workers*, a report commmissioned by the Task Force.

From the employer's perspective, costs incurred as a fixed amount *per employee* (i.e. "quasi–fixed" costs) create incentive for a cost minimizing employer to obtain any given total hours of labour with a higher number of hours worked per employee. Such a lengthened work schedule reduces the number of employees and the employer's overall expenditure on quasi–fixed costs. Quasi–fixed costs may be ongoing (e.g., employer contributions to health insurance premiums) or one–time costs for each employee (hiring, training and termination expenses). On the other hand, the employer's incentive to reduce hours of work per week per employee grows with the increasing impact of fatigue on productivity, higher overtime premiums or administrative costs in obtaining permits for long hours of work.

Preferences for work time reductions among older workers in Ontario have been analyzed using unpublished data from Statistics Canada's Work Reduction Survey. Policy changes to facilitate voluntary work reductions by older workers are examined, primarily by modifying the compensation package to remove (unintended) economic barriers to employment sharing.

Preferences for Work Time Reductions among Older Workers

The most comprehensive source of data on preferences for work time reductions among Ontario employees is the Statistics Canada Work Reduction Survey administered as a supplement to the June 1985 Labour Force Survey (LFS). The survey was limited to one–third of the LFS sample and was restricted to employed persons at least 18 years of age who were not planning to return to school in the fall. Responses were received from 3462 employees in Ontario (15,830 in Canada as a whole). An important advantage of appending the Work Reduction Survey to the Labour Force Survey is that results can be extended to the entire Ontario labour force using the usual LFS weights to adjust for factors such as non–response, urban–rural status and demographic characteristics.

In Work Reduction Survey, employees were first asked whether they would take a pay cut or give up all or part of a pay increase if they received

more time off in return. It was clearly explained that

> You would lose an hour's pay for each hour that you no longer worked... When you are answering questions, assume that your job situation stays the same. Your job security or seniority would not be affected. You would not jeopardize your chances for promotion or pay raises. You wouldn't lose your pension or other benefits.

Employees who indicated a willingness to trade income for a reduction in work time were then asked to consider separately five possible work reduction options: fewer days per week, fewer hours per day, increased unpaid annual vacation, increased unpaid sabbatical leave and earlier retirement. For expositional ease, in this report, the various work time reduction options will be referred to as "employment–sharing".

In Ontario over 1 million employees (27.3 percent of all eligible employees) want to reduce their work time with a proportionate reduction in pay. Among employees approaching the normal retirement age (i.e. employees in the 55 to 64 year age group) the proportion who wish to engage in employment sharing (20.8 percent) is of similar magnitude but slightly smaller than the proportion of employees in the under 55 age group who wish to share employment (28.2 percent). The results also indicate that 22.4 percent of employees in the 65 and over age group wish to reduce their work time. Since there are relatively few employees in this age category, however, the size of the sample is somewhat small and the results for this group should be interpreted with caution. In summary, the results indicate that a significant minority of employees desire work reductions and the desire for reduced work time is not concentrated among those nearing retirement age — it is spread through all age ranges.

Employee attitudes toward each of the five employment sharing options will be considered in turn. Preferences for a reduced work week indicate that 18.3 percent of employees gave a positive response when asked: "Would you be willing to work fewer days each week?" Among workers nearing normal retirement age 12.8 percent responded affirmatively compared to 19.0 percent in the under 55 age group and 13.1 percent in the over 65 category. For every age category the most popular choice is a reduction of one day per week (a 20 percent work and income reduction) and the second most popular choice is a reduction of one–half day per week (a 10 percent work and income reduction).

Reductions in the number of hours worked per day are less popular among all age groups than reductions in the number of days worked per week. For example, the data indicate that among those in the 55 to 64 age group, 8.4 percent want fewer hours per day compared to 12.8 percent who want fewer days per week. In the under 55 age group 10.2 percent wish to reduce daily hours and in the over 65 age group 9.7 percent want a reduction. The most popular magnitude of work day reduction in every age group is a reduction of one to one and one–half hours per day, (i.e. a reduction of about 12 to 18 percent of work time).

Employee preferences for more time off per year in the form of increased unpaid annual vacation were examined. For all age groups together, 19.9 percent of employees expressed a desire to take increased unpaid annual vacation. For employees in the pre–retirement years, the proportion is 15.7 percent, compared to 20.5 percent for the under 55 age group and 13.1 percent for workers 65 years of age and over. The most popular magnitude of reduction among every age group is an extra two weeks of unpaid vacation per year, corresponding to a 4 percent work time and income reduction (assuming 50 weeks work per year). The second most popular choice in every group is a one month increase in unpaid vacation, corresponding to a work and income reduction of about 8 percent per year.

Extended unpaid "sabbatical" leaves are not yet common in the general work force, although they have recently become popular in the teaching profession where they are known as "deferred salary leave plans" or, more commonly, "four over five plans." In the simplest version, a teacher spreads four years salary over five years by teaching at 80 percent of full salary for four years followed by one year of leave at 80 percent of salary. More generally, x years salary can be spread over y years, and the leave may be taken before the final year of the plan. Deferred salary leave plans are popular with teachers because the plans allow increased flexibility for teachers to adapt their work schedule to their preferences. Such plans are

also popular with school boards because they prevent layoff of teachers and allow senior teachers to be temporarily replaced by junior teachers with a lower salary.

Employees in the Work Reduction Survey who expressed an interest in employment sharing were asked: "Would you be willing to take a longer period of time off in a few years?" Those who answered affirmatively were then asked: "How long a period?" and "In how many years?" The results show that 13.7 percent of employees have a desire for an unpaid sabbatical leave, surprisingly high given the rareness of such plans in the work force. Among the 55 to 64 year age group, 10.9 percent expressed an interest compared to 14.1 percent of those under 55 and 10.5 percent of employees 65 years and over.

For employees in the 55 to 64 age group, the most popular option is a leave of two months duration taken every one or two years, corresponding to a work time reduction of about 8 to 16 percent. For the under 55 age group, two months is also the most popular duration of unpaid leave but the desired frequency is about evenly split between one to two years and three to four years.

As the last employment sharing option, employees were asked: "Would you reduce or give up future pay increases in order to save up time to retire early?" In the aggregate, 12.8 percent responded positively. The positive response was 12.1 percent for employees in the 55 to 64 age groups and 13.1 percent for employees in the under 55 age group. The question is, of course, not relevant for most employees in the 65 and over age group since they are already past the age of normal retirement.

The analysis above indicates preferences for five employment sharing options considered separately and, although an employee may have expressed views on more than one option, he or she would probably not want to engage in them simultaneously. Those employees who expressed an interest in reducing their work time were asked how they would most like to take time off. In the aggregate, a reduction in the number of days worked per week is the most popular option, being preferred by 36.8 percent of employees who wish to reduce their work time, followed by increased unpaid annual vacation (preferred by 26.3 percent) and earlier retirement (17.8 percent). Among the 55 to 64 year age group, earlier retirement is the most popular option (30.0 percent) followed closely by reduction in the number of days per week (26.3 percent) and increased annual vacation (24.0 percent). Results for the under 55 age group closely parallel the overall results. For the 65 and over age group, earlier retirement is inapplicable and sabbatical leaves are not popular, presumably due to the relatively long time horizon in these plans. Increased unpaid vacation and a reduced work week are the employment sharing options preferred by the over 65 age group.

The survey results analyzed in this section indicate that a significant minority (about 20 percent) of employees in the 55 to 64 age range and 65 and over age range desire reduced work time. In order to facilitate a flexible, phased approach to retirement the Ontario Employment Standards Act (ESA) could be modified to give workers 55 years of age and over an *entitlement* to voluntary reductions in their work time (with a proportionate reduction in pay). The survey results indicate that the most popular options for older workers would be an entitlement to reduce the work week to four days per week, an entitlement of up to one month of unpaid annual vacation (in addition to the normal paid vacation) and the right to earlier retirement with appropriate actuarial adjustment of pensions. The survey results suggest that such options would appeal to about 10 to 20 percent of workers in the 55 years and over age group.

Eliminating barriers to work reductions for older employees

Employer expenditures on fringe benefits which are specified on a per employee basis rather than a per hour basis constitute an inducement for employers to require longer hours of work and resist employees' desires to engage in employment sharing. Average employer expenditure on various components of compensation in a 1984 survey of private sector employers by the Pay Research Bureau shows that expenditure on "fringe" benefits is

substantial and adds almost 50 percent to pay for straight time worked.

Whether expenditures on fringe benefits constitute a quasi–fixed or a variable cost depends on the particular provisions of the benefit and the type of employment sharing contemplated.

Employer contributions to the three legislated benefits, Workers' Compensation (WC), Unemployment Insurance (UI) and the Canada Pension Plan (CPP), are specified as a percentage of earnings up to a ceiling level per employee (e.g. $490 per week for UI in 1986). For employees with earnings below the ceiling level, employer contributions to these benefits are variable costs which, for a given wage rate, vary directly with the number of hours worked. For employees above the ceiling level, however, employer contributions become a quasi–fixed cost since contributions remain at the maximum level when hours are increased or decreased. These legislated benefits thus create an (unintended) economic incentive for employers to resist employment sharing among employees with earnings above the ceiling level.

Simply abolishing the ceilings is not a desirable policy because it would defeat the essential purpose of the ceilings which is to prevent employees with very high incomes from drawing unseemly high benefits from UI, WC or CPP. A more desirable policy would be to *prorate* the ceilings according to the number of hours worked. The weekly UI ceiling, for example, would be reduced to 80 percent of the normal level for employees working a four day week. Prorating the contribution ceilings would convert UI, WC and CPP from quasi–fixed costs to variable costs and eliminate the current bias against employment sharing.

Employer contributions to the Ontario Health Insurance Plan (OHIP) are a quasi–fixed cost since premiums are specified on a family or individual basis. Allowing older employees to engage in employment sharing would increase employer contribution costs (as a percent of earnings) unless the employer's contribution could be prorated according to hours worked, a solution that may be inhibited by an existing collective agreement or personnel policies.

Although labour market considerations would likely be of only minor importance in policy decisions regarding the financing of health care, it is perhaps worth noting that the quasi–fixed cost aspect of OHIP premiums would be eliminated if OHIP were financed by a payroll tax rather than premiums. A payroll tax is currently used in both Quebec and Manitoba to finance health care. A payroll tax could prove more efficient from a labour market viewpoint (by eliminating an unintended bias against employment sharing), and it would be more equitable because it would replace a regressive head tax with a proportional earnings tax.

Most pension plans in Ontario are defined benefit plans in which the level of benefits are related to the employee's earnings in his last few years of employment or his best few years (which is often the same thing in an inflationary environment). If an employee nearing normal retirement age elects to reduce his or her work time through employment sharing, the result can be a negative impact on pension benefits which is disproportionate to the reduction in lifetime work and income. To eliminate this unintended bias against employment sharing among older workers, the Employment Standards Act (or other legislation pertaining specifically to pensions) should be amended to give senior employees on reduced work time the right to continued pensions contributions at the full–time rate (by allowing the employee to "top up" employer contributions). Pension benefits for older workers who had engaged in employment sharing would then be calculated as if the senior employee was earning a full–time salary during the employment sharing period.

The Ontario Employment Standards Act (Section 29) requires that employees be given at least two weeks vacation with pay every twelve months. Vacation pay is required to be at least "4 percent of the wages of the employee in the twelve months for which the employment is given." This vacation provision in the ESA is a variable cost since the minimum level of vacation pay varies with earnings and therefore hours worked. If a senior employee engaged in employment sharing, vacation pay under the ESA would be adjusted proportionately and

would therefore not constitute a barrier to work reductions.

In contrast, the ESA provision (Section 26) for seven paid public holidays per year specifies that employees be paid their "regular wages". Holiday pay could become a quasi–fixed cost because, for example, an employment sharing senior employee working four days per week may be entitled to the same holiday pay as an employee working five days per week. This unintended bias against reduced work time could be eliminated by amending the ESA to specify that on public holidays an employee will receive not less than 5 percent of his or her earnings in the four weeks preceding the holiday. Such a provision is equivalent to a regular day's pay for a full–time employee working five days per week but it is adjusted proportionately for employees working less than (or more than) standard hours.

Collective agreements or other employment contracts often contain vacation and holiday provisions which are more generous than the ESA minimums. To ensure that these provisions are variable rather than quasi–fixed costs, the ESA should be amended to require that in all employment contracts "each paid holiday provided by the employer shall be compensated at not less than 5 percent of the employee's earnings in the four week period preceding the holiday". Similarly, the ESA should require that in all employment contracts "each week of paid vacation provided by an employer shall be compensated at a rate not less than 2 percent of the employee's earnings in the 50 weeks preceding the vacation". These changes would ensure that vacation and holiday provisions in private employment contracts are not quasi–fixed costs and would eliminate any bias against employment sharing by workers approaching normal retirement age.

Summary and policy conclusions

- A flexible, phased reduction in work time may be desirable as an alternative to the rigid and abrupt termination of work that characterizes conventional retirement.
- Data from the 1985 Work Reduction Survey indicates that a significant minority (about 20 percent) of older employees (55 years and over) in Ontario would like to reduce their work time with a proportionate reduction in pay.
- One policy change which would facilitate a flexible approach to retirement would be to amend the Ontario Employment Standards Act (ESA) to give employees 55 years and older an *entitlement* to voluntary work time reductions. Survey results indicate that the most popular employment sharing options for workers in this age group would be an entitlement to a four–day work week, an entitlement to up to one month of unpaid vacation in addition to their normal paid vacation, and an entitlement to earlier retirement (with appropriate actuarial adjustment of pensions but no penalty).
- Employer contributions to fringe benefits which are specified on a per employee basis (rather than a per hour basis) constitute "quasi–fixed" costs which give the employer an economic incentive to resist employment sharing by senior employees.
- Many fringe benefit provisions in legislation and in private employment contracts appear to have been designed with full–time employees in mind. Minor modifications to the provisions of these benefits may be required to ensure that these benefits do not contain an unintended economic incentive which biases employers against allowing employees to reduce their work time.
- Ceiling levels to contributions (and benefits) for Unemployment Insurance, Workers' Compensation and the Canada Pension Plan should be prorated according to the number of hours worked.
- Employees nearing normal retirement age who engage in work time reductions could affect their pension benefits disproportionately in many defined benefit pension plans. To prevent such pensions from creating an (unintended) barrier to employment sharing, senior employees who engage in work time reductions should be given a legal entitlement to have pension contributions continued at the full–time rate (by allowing the employee to "top up" employer contributions). Pension benefits would then be calculated as if the senior employee was earning a full–time salary during the employment sharing period.
- Financing the Ontario Health Insurance Plan (OHIP) through a payroll tax rather than by conventional premiums would ensure that employer contributions to OHIP are a variable cost rather than a quasi–fixed cost.

- The ESA should require that pay for public holidays be not less than "5 percent of earnings in the preceding 4 weeks" rather than a "regular day's pay". Similarly, the ESA should ensure that paid holidays provided in private employment contracts be compensated by the same formula.
- The ESA should also require that each week of vacation provided in private employment contracts be compensated at 2 percent of earnings in the 50 weeks preceding the vacation (rather than by a regular week's pay). These ESA provisions would ensure that holiday and vacation pay are variable costs rather than quasi–fixed costs and therefore would not constitute a barrier which inhibits employers from permitting employment sharing by older workers.